

PROBLEMS CONCERNING THE EARLY HISTORY OF DEPOSITUM  
AND THE PENAL ACTIO DEPOSITI IN FACTUM

by

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DEDICATION

FOR MY MOTHER



DECLARATION

I declare (a) that this thesis has been composed by myself and (b) that the work is my own.

An amended version of part of chapter 2 appears in RIDA 25 (1978) p.247ff entitled, The Prefatory Section of D.16.3 Depositi vel contra. Chapter 8, The actio depositi in factum as a noxal Action, appears in BIDR 83 (1980) p.191ff.

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## ABBREVIATIONS

A.G.: Archivio Giuridico (1868-)

Ann Palermo: Annali del Seminario giuridico dell' Università di Palermo (1913-)

BIDR: Bullettino del' Istituto di diritto romano (1888-)

Coll.: Collatio legum Mosaicarum et Romanarum.

D.: Digest of Justinian.

FIRA: Fontes Iuris Romani Anteiustiniani, ed. S. Riccobono.

Gaius, Inst.: Institutes of Gaius.

Index Intp.: Index interpolationum quae in Iustiniani digestis inesse dicuntur (Weimar, 1929)

Iura: Iura. Rivista internazionale di diritto romano e antico (1950-)

JRS: Journal of Roman Studies (1911-)

Justinian Inst.: Institutes of Justinian.

Karlowa, R.RG.: O. Karlowa, Römische Rechtsgeschichte (2 vols., Leipzig 1885, 1901)

Kaser, Q.E.R.E.: M. Kaser, Quanti Ea Res Est (Munich, 1935)

Kaser, R.P.R.: M. Kaser, Das römische Privatrecht (1st ed., Munich, 1955; 2nd ed., Munich, 1971)

Labeo: Labeo. Rassegna di diritto romano (1955-)

Lenel, Pal.: O. Lenel, Palingenesia Iuris Civilis 2 vols. (1889)

Lenel, E.P.: O. Lenel, Das Edictum Perpetuum (3rd ed., Leipzig, 1927)

LQR: Law Quarterly Review (1885-)

P.S.: Pauli Sententiae.

P.W.R.E.: Paulys Realenzyklopadie der klassischen Altertumswissenschaft, neue Bearbeitung, ed. G. Wissowa, etc. (Stuttgart, 1894-)

RHD: Revue historique de droit français et étranger (1922-)

RIDA: Revue internationale des droits de l'antiquité (1948-)

Rotondi, Scritti: G. Rotondi, Scritti Giuridici (3 vols., Milan, 1922)

SDHI: Studia et documenta historiae et iuris (1935-)

TVR: Tijdschrift voor Rechtsgeschiedenis. Revue d'histoire du droit (1918-)

ZSS: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Römianistische Abteilung (1880-)



## ABSTRACT

The thesis concerns itself firstly with certain problems arising out of the early history of depositum in Roman Law; such as the precise nature of the action in duplum ex causa depositi of the XII Tables. The consideration of these questions is complementary to the second theme of the thesis which concerns the alleged penal nature of the actio depositi in factum. Thus, for example, it is often argued that the action in factum was derived from the remedy of the XII Tables and that it acquired from the latter many of its penal characteristics. We demonstrate that this is unlikely to have been the case.

Generally it is thought that the actio depositi in factum was a penal remedy, not only when it was first introduced, but throughout classical law. The action's penal nature is demonstrated principally by identifying its characteristics. Most important in this respect is that it is alleged to have been passively intransmissible, noxal, available only intra annum and to have lain cumulatively against joint wrongdoers.

We argue that the characteristics of the action were in fact quite different in classical law. It was passively transmissible, liability was de peculio and correal against joint depositors, and it may have been available in perpetuum. These characteristics strongly suggest that the action was reipersecutory, not penal.

The significance of our conclusions differs depending on what point in time the action in factum acquired the characteristics which it had in classical law. If in origin it was a penal remedy, its transformation into a quite different sort of action was accomplished very early on in its history. But, there is no evidence that the characteristics of the action were different when it was first introduced. If this is correct it throws into question the accepted idea that the early legal protection of depositum was by means of delictual remedies.

CHAPTER I

INTRODUCTION

## INTRODUCTION

In this introductory chapter we intend to survey the main treatments of depositum written this century. The survey of the literature will show that there is widespread agreement on the two themes of this thesis; namely, (1) the early history of deposit and (2) the penal nature of the actio depositi in factum.

It is accepted that the main stages in the development of depositum in Roman law were as follows: (a) the XII Tables introduced an actio in duplum ex causa depositi<sup>1</sup>; (b) in the Republic the praetor introduced an actio in factum concepta which sanctioned a failure to return the object deposited<sup>2</sup>; (c) sometime after the introduction of the action in factum, a bona fide actio in ius concepta was established<sup>3</sup>. It was at this point in time that depositum was recognised as a contract by the civil law; (d) the compilers of the Corpus Iuris Civilis were confronted in their sources with the two classical law actiones depositi. However, for them, differences of formulation between actions, whether in factum or in ius, were no longer of importance<sup>4</sup>. In the Corpus Iuris Civilis they therefore

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1. Coll., 10.7.11 = P.S., 2.12.11.

2. Gaius, Inst., 4.47.

3. Gaius, 4.47.

4. See Buckland, A Textbook of Roman Law, p.662ff.



present a single actio depositi without stating whether the classical source was discussing the action in factum or that in ius.

We are primarily concerned with the first two stages of this development. The reason we consider certain aspects of the early history of depositum is to complement the second theme of the thesis which concerns the alleged penal nature of the action in factum. Some scholars have argued that the latter remedy was derived from the action of the XII Tables and that it took over from the earlier remedy some of its penal features. Therefore, if we wish to contest the common view that the praetorian actio depositi was a penal remedy it is important to identify the precise nature of the action of the XII Tables. Knowing that, we can then determine the likelihood that the action in factum was in fact derived from it. Such a connection between these two remedies would be all the more likely if the action in factum was introduced before the action in ius; hence, this is a further point to consider. Also, it is generally thought that the action in factum was passively intransmissible; one argument in support of this assertion being that there is no mention in the edict of an action available against the heir in cases of ordinary deposit while there is in the case of necessary deposit. Yet, there are a number of scholars who argue that the edict for depositum preserved in D.16.3.1.1 is an amalgam of separate edicts put together at a later date. If that is correct, a

provision concerning the liability of the heir in ordinary deposit might well have been dropped when constructing the edict in its present form. Therefore, we must also consider the question whether D.16.3.1.1 does reproduce the edict in its original form or not. We have already noted that there is general acceptance of the main stages of the development of depositum to which we referred. However, on points of detail such as the nature of the action of the XII Tables, its relation to the action in factum and the problem of the original form of the edict we will find a wide range of views in the literature.

Taubenschlag, *Zur Geschichte des Hinterlegungsvertrages im römischen Recht*, Grünhuts Zeitschrift 34 (1907) p.683ff; 35 (1908) p.129ff, is an historical study of the development of depositum from the time of the XII Tables to the introduction of the action in ius.

The action of the XII Tables, Taubenschlag argues, was an independent, penal actio depositi which sanctioned all cases of depositing. The action in factum for ordinary deposit, he believes, was introduced in an edict shortly before the time of Quintus Mucius Scaevola. This edict also restricted the action of the XII Tables to cases of necessary deposit. The part of the edict preserved in D.16.3.1.1 which, for cases of necessary deposit, gives an action against the heir ex dolo defuncti in simplum,

and an action in duplum against the heir ex dolo suo, was introduced later; sometime after Sabinus but before Neratius.

The action in factum for ordinary deposit was similar to the action of the XII Tables in two respects: it lay only where there had been dolus and it was penal. The penal nature of the action in factum, Taubenschlag suggests, though he does not present any direct evidence to support the view, is shown by the fact that when first introduced it was noxal, actively and passively intransmissible, and lay cumulatively against all joint depositees guilty of dolus. Whereas this was the position when the action in factum was first introduced, its character was later changed, a development which Taubenschlag ascribes principally to Neratius. Like the contractual bona fide action in ius, which by this time had also been introduced, the action in factum came to be conceived in classical law as a reipersecutory remedy. Thus, for example, it was no longer noxal, but lay de peculio and was also available against the heir ex dolo defuncti pro parte hereditaria.

This process of assimilation between the action in factum and action in ius on the basis of the latter was a gradual one, but, when it was complete, differences between the two remedies continued to exist because one had a praetorian and the other a civil law formula. These differences, which were procedural, explain why the action in factum

did not fall into disuse because, in certain circumstances, it was a more appropriate remedy than the action in ius. Thus, it could be brought by a filiusfamilias in his own name where he had made a deposit but the action in ius could not.

In time even these procedural differences between the two remedies disappeared as the distinctions between types of formulae lost their importance under cognitio extraordinaria. This development in turn finally resulted in the availability of a single bona fide actio depositi based neither solely upon the action in factum nor solely upon the action in ius, but on features of both.

Rotondi, *Le Due Formule Classiche dell' actio depositi*, Scritti 2 (Milan, 1922) p.1ff<sup>5</sup>, identifies the following as the main areas of interest in the history of depositum:

- (1) the origins of the two classical law formulae;
- (2) the rules and principles applicable to each, and
- (3) the way in which they became fused into the single remedy (actio depositi) found in the Corpus Iuris Civilis.

In addressing himself to the origins and relationship of the action in factum and action in ius, Rotondi is concerned mainly with determining why there came to be

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5. See also, Scritti 2, p.56ff and p.91ff.

two actiones depositi in classical law and how it was that they could exist side by side. He surveys the views expressed by earlier scholars on these matters and dismisses them on the grounds that their approach is always 'dogmatic'; that is, the earlier scholars attempt to explain the relationship between the two formulae merely by identifying practical differences in the rules applicable to each. For example, Savigny, System 5, 216 believes that the formula in factum was introduced to provide the filiusfamilias with a remedy in deposit because he could not bring an action with an intentio in ius concepta. In fact, argues Rotondi, a solution to these problems can only be found through an historical study of depositum.

He begins his historical study by looking at the action in duplum established by the XII Tables. He decides that it was an independent penal actio depositi which applied to all deposits. Besides its multiple condemnation (in duplum), Rotondi believes that the action was perpetual, a characteristic which reflects its civil law origin, and that it was passively intransmissible, which is a feature of its penal nature. Towards the end of the Republic the action of the XII Tables came to be regarded as inadequate (undefined) and also too harsh. As a result the praetor intervened c. 45 B.C.. He restricted the action of the XII Tables to cases of necessary deposit and introduced a completely new action in simplum for all other

deposits. Although the latter was a completely new remedy it was nevertheless influenced by the action of the XII Tables from which it acquired its penal characteristics. In fact, Rotondi believes that all actiones in factum were penal, the praetorian actio depositi being no exception. Also, it was passively intransmissible, it lay only for one year and it was noxal; features which confirm its penal nature.

The introduction of the action in ius sometime in the early Empire was the result of the work of the jurists. They commented upon and developed the wording of the edict and the formula in factum to the point where, in deposit, one could speak of a dare facere oportet. At this point in time the praetor introduced the civil law formula in ius and depositum was recognised as a contract. The civil law action, consistent with all contractual remedies, was passively transmissible, perpetual and lay de peculio.

A number of further points should be noted: firstly, the formula in factum formed the basis for the juristic commentaries. Even once the formula in ius was introduced Rotondi suggests that it was mentioned in the commentaries only in so far as it differed from the praetorian remedy. Secondly, the action in factum continued to exist beside the action in ius in classical law but, ultimately at least, only in a subsidiary role. It would still be used by a

filiusfamilias who could not raise a civil law action.

Thirdly, in the edict, depositum is classified with the bonae fidei iudicia<sup>6</sup>. However, before the introduction of the bona fide action in ius it stood in de rebus creditis. The civil law formula, argues Rotondi, was introduced at a time when the categories of the edict were still fluid and the position of depositum was changed because of the power of attraction of this remedy. On the other hand, the bona fide actions for commodatum and pignus were introduced later than that of deposit, once the edictal categories had become fixed, which explains why they are still to be found in de rebus creditis<sup>7</sup>.

Precisely when the two classical law formulae became fused into the single remedy found in the Corpus Iuris Civilis Rotondi is unsure. He suggests that with the disappearance of the formulary system the differences between the formulae became increasingly blurred and by the time of Justinian the contract of depositum gave rise only to the civil law bona fide action. The compilers, however, made indiscriminate use of texts which referred to both formulae and attempted to eliminate their differences with a view to presenting a consistent treatment of the single actio depositi existing in their own time which they based on the action in ius.

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6. Lenel, E.P., p.xviii.

7. Lenel, E.P., p.xix.



As regards the historical development of depositum from the XII Tables to the introduction of the formula in ius, Longo, Il Deposito (Milan, 1946) accepts the conclusions reached by Rotondi<sup>8</sup>. The major part of his study he devotes to an analysis of the substance of the contract; for example, the obligations of the deposittee, in particular his liability for dolus, the content of dolus in classical law and the Justinianic innovations. Only once does Longo make a comment on the nature of the action in factum. He suggests that D.16.3.7.1 (Ulp. 30 ed.), before it was altered by the compilers, contained a statement to the effect that the actio depositi lay only for one year (intra annum)<sup>9</sup>. Such a characteristic, he says, was a relic from the penal nature of deposit. Therefore, just as Longo accepted Rotondi's conclusions on the historical development of depositum, it is probably a fair inference that he also accepted Rotondi's arguments concerning the penal nature of the action in factum.

Burillo, Las Formulas de la actio depositi, SDHI 28 (1962) p.233ff, undertakes a study of depositum in order to explain why, although a civil law actio depositi in ius was known to Gaius (4.47), he does not mention deposit in

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8. They differ on some points; for example, the reasons for the present form of the edict. This point is dealt with in the chapter on the edict.
  9. His analysis of the text is confused because, in fact, D.16.3.7.1 concerns an action against the heir. See the chapter on the duration of the action in factum; especially n.6.



Inst., 3.90-91 as a source of obligations re. Burillo never expressly answers the question which he poses; nevertheless it is clear he believes that the explanation is to be found in the history of the transaction. Only with the introduction of the action in ius did depositum give rise to obligations re. Yet, this remedy was introduced only shortly before the time of Gaius. Up until then depositum had been sanctioned by delictual remedies. The action of the XII Tables ex causa depositi was none other than the actio furti nec manifesti which, c. 100-80 B.C., gave way to an actio depositi in factum. Burillo believes that all actiones in factum in origin were penal remedies and particularly important in this respect is the fact that liability in the actio depositi was only for dolus<sup>10</sup>. Therefore, the only independent action on deposit to exist up to the time of Gaius<sup>11</sup> sanctioned as a wrong the failure to return a deposit; it did not lie for the breach of obligations which arose from depositing as such. Furthermore, the action in factum was a praetorian remedy. Gaius, 3.90-91 mentioned only transactions recognised by the civil law as giving rise to real obligations.

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10. At p.248 Burillo affirms the view that all actiones in factum in origin were penal. However at p.260f he argues that the actio commodati in factum was not penal. The action in factum for deposit is to be distinguished from that remedy because liability was for dolus.

11. There was also an action in factum for necessary deposit. Here we discuss only that for ordinary deposit.

In support of his belief that the early legal protection of depositum independent of theft was by means of a penal remedy, Burillo seeks to identify the characteristics of the actio depositi in factum. Penal actions have certain features in common, and, in conformity with the group, the action in factum, he argues, was passively intransmissible, noxal and lay cumulatively against each joint deposittee who was guilty of dolus. The fact that the action in factum was penal also leads Burillo to have certain expectations of it consistent with the operation of such remedies. He expects it to cumulate with the actio furti on the grounds that penal actions do not bar one another, and to cumulate with the condictio furtiva because the action in factum lay for a penalty and the condictio for compensation. Burillo, with some doubts, in fact comes to the conclusion that the action in factum did not lie cumulatively with the actio furti. However, this in no way detracts from its penal nature. He argues that the jurists distinguished between the wrong of a failure to return a deposit dolo malo and theft, which, in this context, was constituted by an appropriation of the property to one's own use (furtum usus). Depending upon the facts of the case the pursuer would have one action or the other and where (exceptionally) he had a choice of remedies, he could bring the most advantageous which was

the actio furti<sup>12</sup>.

As regards the action in factum and the condictio furtiva, in spite of what logic, determined by the nature of each remedy<sup>13</sup>, demands, Burillo believes that they did not lie cumulatively. But, beyond this observation, he does not develop the argument.

Burillo argues that the bona fide actio depositi in ius was a creation of the jurists who interpreted the action in factum to the point where the deposittee was regarded as under an obligation (oportere) to return the property entrusted to him<sup>14</sup>. It was this obligation which was sanctioned by the civil law action, the final responsibility for the introduction of which is ascribed to Julian. Consistent with its purely compensatory function the action in ius was passively transmissible, it lay de peculio and did not cumulate against joint

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12. For Burillo (p.272) cumulation in this discussion occurs where two remedies arise from the same (delictual) act. That was not the case here (hence there was no cumulation) because two different acts were required to give rise to the action in factum and actio furti. Even where the deposittee was guilty of these two separate acts, both actions did not lie, presumably - though Burillo does not say as much - because the two acts were in relation to the same piece of property.

13. The one being penal and the other compensatory.

14. This process, which Burillo refers to as the contractualisation of deposit, he believes (p.268) to have been helped by the practice of stipulating for the return of the property.

depositees who were in breach of their obligations<sup>15</sup>.

By the time of Gaius there existed two separate remedies for deposit. But, in the Corpus Iuris Civilis, only a single actio depositi is ever mentioned. The reason, suggests Burillo, is that with the disappearance of the formulary system the distinction between the classical law formulae were no longer maintained. In post-classical times this led to an assimilation of the two actiones depositi though precisely when they were fused Burillo is undecided. The treatment of deposit in the Corpus Iuris Civilis is that of a bona fide contract. However, for the purpose of this treatment the compilers used indiscriminately texts relating both to the action in factum and to the action in ius. Where appropriate they altered the texts which concerned the action in factum and erased its penal characteristics in order to bring it into line with the conception of depositum as a contract.

Maschi, La Categoria dei Contratti Reali (Milan, 1973) is a study of the category, 'real contracts'. It begins by

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15. Burillo believes that the action in factum survived alongside the action in ius in classical law. However, it is not clear whether it survived in its penal form or in its form as developed by the jurists. Burillo argues that many of the classical tests dealing with the action in factum were altered by the compilers who wished to erase its penal features. This suggests that the action survived in its penal form in classical law.

asking whether the category exists in modern law (especially modern Italian law) and if so, how real contracts are to be distinguished from other contracts. The work argues against the view that they have ceased to exist as a group distinct from contracts which become binding on the mere agreement of the parties<sup>16</sup>. Rather, it is affirmed that the essential and distinguishing feature of the real contracts is that they become binding only on the transfer of a res between the parties.

Maschi then undertakes to study the origins and developments of the individual transactions which in Roman law made up the category of real contracts; it being Roman law which contributed the classification found in most of the modern legal systems which he considers. He attempts to identify the features which were particular to these transactions, why they came to be classified together and when. The book therefore ranges much wider than a mere study of deposit. However, in its central part, the historical development of depositum as one of the

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16. As regards Scots law, this is the view taken by Gloag on Contract (Edinburgh, 1929) p.14. 'There seems no reason for holding that the obligations of a borrower, a depositary or pledgee do not arise from contract in the same way as the obligations of the parties to a contract of sale ... or other contract recognised by the Roman law as consensual.' But, cf, Gow, The Mercantile and Industrial Law of Scotland (Edinburgh, 1974) p.261ff and Walker, Principles of Scottish Private Law 2 (Oxford, 1983) p.44f.

contracts which came to make up the group is considered from the period before the XII Tables to late classical law.

In the very earliest period depositum, in common with mutuum and commodatum, was a transaction between friends typified by a datio rei and a promise (pactum) to return the property. A failure to return the res in these transactions, based as they were on amicitia, amounted to a breach of fides. Maschi suggests that the person guilty of such a rupta fides may have been subjected to the religious sanction sacer esto.

The first directly legal protection for deposit was provided by the XII Tables which introduced a penal action in duplum, available where the deposit had been made in an emergency (tumultus incendii ruinae naufragii causa). That is to say, the action of the XII Tables was available only in cases of necessary deposit. An action for ordinary deposit (in factum) was not introduced until the second half of the first century B.C. When it was introduced the action in factum carried over from the action of the XII Tables many of its penal characteristics. However, the praetorian remedy is not said by Maschi to be a pure penal action; rather, he describes it as being of 'impronta penale' because damages were not for a multiple. The failure to return a deposit was nevertheless conceived of as a wrong, an hypothesis which is proved by the characteristics which the action exhibited. In common

with all penal actions, most importantly, the action in factum was passively intransmissible. Also, it was noxal and lay only for one year (intra annum), the last being a feature which Maschi, following the opinion of Cassius reported in D.44.7.3pr.,<sup>17</sup> sees as a direct reflection of its penal nature.

Around the time of Sabinus the action in ius was introduced and depositum was recognised as a contract. However, the civil remedy did not completely supplant the action in factum. The latter survived alongside the civil remedy because it lay in circumstances where the action in ius did not. Where a deposit was made with a slave or a pupillus without auctoritas tutoris neither of these individuals could incur a civil law obligation. The appropriate remedy in these cases was therefore the action in factum.

Gandolfi, Il Deposito (Milan, 1976) argues that in order to trace the development of depositum in Roman law it is essential to recognise the proper significance of the fact that in classical times, for deposit, there existed both an action formulated in factum and one formulated in ius. It was the action in factum which formed the basis of the juristic treatments on deposit and on it the typical characteristics of the institution were established.

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17. See the chapter on the duration of the action in factum.



Thus, for example, a deposit must be gratuitous,<sup>18</sup> liability was only for dolus and it was the very same object entrusted for safekeeping which had to be returned (si paret ... mensam argenteam deposuisse eamque dolo malo ... redditam non esse)<sup>19</sup>. The formula in ius was introduced after the formula in factum and its most important feature was a clause ex fide bona. In this case the depositee was condemned if he had failed in one of the duties required of him by bona fides; there was no mention of a dolose failure to return the same object deposited. Gandolfi emphasises that bona fides exigit ut quod convenit fiat. The classical law jurists, in order to give fuller effect to the intentions of the parties were prepared to sanction with this remedy arrangements which did not conform to the strict requirements of the action in factum but which the jurists were still prepared to treat as deposits. Therefore, for example, the liability of the depositee might be varied by pact, and it might be agreed that, in the case of money, he need not return the very same coins deposited but tantundem, and, in addition, pay interest on the sum received. These, and

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18. There is no suggestion in the formula in factum that the deposit need be gratuitous. Gandolfi, p.111ff argues that it was gratuitous for two reasons:  
(1) because an actio conducti would be available where payment was made for the safekeeping;  
(2) because liability was limited to dolus. But cf, Litewski, BIDR 1979 p.277ff who argues that liability was limited to dolus because deposit was gratuitous.

19. Gaius, 4.47.



other developments in deposit, Gandolfi believes were made in classical law on the basis of the bona fide action in ius; they were not Justinianic in origin.

Gandolfi's thesis brings him into conflict with those, such as Rotondi, who believe that the existence of two deposit formulae in classical law is to be explained purely historically. Gandolfi combats a number of conclusions associated with this approach: the idea that the formula in ius was introduced as the result of juristic interpretation of the formula in factum which came to see a dare facere oportet in cases of deposit; the idea that the two classical law actions were applied to similar claims and that the differences between them essentially originated in the fact that one was formulated in factum and the other formulated in ius; and thirdly the suggestion that the action in factum survived alongside the formula in ius either for reasons of inertia or merely because it could be brought by a filiusfamilias where the civil law action could not.

As far as Gandolfi is concerned the action in ius was introduced to give greater scope to the intentions of the parties and it was used to sanction circumstances - of which the most notable was irregular deposit - to which the action in factum was inapplicable. Therefore, the area of application of each action was different and remained so in classical law.

Gandolfi was concerned with showing that the two deposit formulae were used for different claims and does not address himself to the question of the characteristics of the action in factum. However, he does refer in passing to the view of the communis opinio that the action lay only for a year and that it was passively intransmissible<sup>20</sup>. No attempt is made to refute this view; therefore the inference may fairly be drawn that Gandolfi also regards the action as having been penal<sup>21</sup>.

The foregoing survey reveals that there is widespread agreement on many features of the history of depositum. Particularly important for our purposes is the influence which the action in duplum of the XII Tables is thought to have had on the action in factum for ordinary deposit. The latter took over from the action in duplum many of its penal characteristics. The alleged characteristics which

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20. p.93.

21. Gandolfi believes that the action of the XII Tables was the actio furti nec manifesti. At p.67, in a discussion of Rotondi's idea that the establishment of the action in factum was an attempt by the praetor to mitigate the severity of the early law on deposit, Gandolfi suggests that the introduction of a condemnation in simplum in the praetorian actio depositi may be explained as part of a general trend, of which the Lex Aquilia and actio de dolo are other examples, to give penal sanctions a compensatory function. Gandolfi's assimilation of the action in factum, actio legis Aquiliae and actio de dolo in this context supports the suggestion that he thought the praetorian actio depositi was a penal remedy.

show that the action in factum was penal were:

(1) passive intransmissibility; (2) noxal; (3) available intra annum; and (4) cumulation against joint depositors guilty of dolus. Therefore, the action in factum was a delictual remedy. It sanctioned as a wrong the failure to return a deposit dolo malo<sup>22</sup>.

The first question we need to answer is, why are these particular features of the action in factum identified in order to show that it was a penal remedy. The essential function of a penal action was to punish the defender, to be distinguished from the function of a reipersecutory action which was indemnification of the pursuer for his loss. From this difference in function there resulted a difference in structure between penal and compensatory remedies<sup>23</sup>.

Traditionally, it is thought that the origin of delictual actions as a substitute for private vengeance explains many of the characteristics which these actions had in common<sup>24</sup>. Where more than one person was engaged in a

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22. But this view is not universally held, see Voci, Pena Privata nel Diritto Romano Classico (Milan, 1939) esp. at p.146f and p.188 n.3; Id., La Dottrina Romana del Contratto (Milan, 1946) p.241. Also, possibly Amelotti, La Prescrizione delle Azioni in Diritto Romano (Milan, 1958) p.42 n.61.

23. See Voci, Pena Privata, P.9ff.

24. See, Jolowicz and Nicholas, Historical Introduction to the Study of Roman Law (Cambridge, 1972) p.172ff.

wrong, vengeance would be meted out to all. Similarly, a penal action lies in full against all wrongdoers and if one paid, the others were not released. The purpose of the action was punishment, hence the pursuer was able to recover in full from each offender. Vengeance was personal, by which is meant that it was permissible only against the wrongdoer, not his heir. This explains why penal actions were passively intransmissible. Penal actions were also noxal. In developed law this meant that where a slave or son-in-power committed a delict the owner or paterfamilias had to pay the penalty or hand over the offender to the victim. However, it is thought that originally the alternatives were the reverse<sup>25</sup>. That is to say, the victim had the right to avenge himself on the wrongdoer but the head of the household could buy off that vengeance. The association of noxal liability with vengeance is also reflected in the rule nox a caput sequitur. If, for example, a slave was sold or manumitted, it was the new owner or the freedman himself who was liable to the action. The primary right of the victim was to vengeance against the wrongdoer and it was therefore him that the liability followed. Lastly, penal actions were available only for a year (intra annum), the possible reason being that vengeance could be exacted only when the blood of the victim was hot.

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25. Thomas, Textbook of Roman Law, p.381.

Penal actions in Roman law were primarily concerned with punishing the wrongdoer with the result that they focused almost exclusively on him. Thus, it was only he who was liable in the action, not his heir. On the other hand, the function of a reipersecutory action was to compensate the pursuer for his loss and in achieving this aim the individual identity of the parties to the dispute was less important<sup>26</sup>. A loss had to be compensated and it was immaterial whether it was to the pursuer or his heir or by the defender or his heir. Such remedies were therefore both actively and passively transmissible. Similarly, because it was merely the pursuer's loss which was to be compensated, if more than one person was involved in the act causing the loss, their liability might be divided or solidary but never cumulative as in penal actions. The pursuer was able to recover his actual loss but no more. A paterfamilias or master was liable de peculio on negotia concluded by his subordinates. The principle in these cases 'seems to be that one who provides the slave with the means of obtaining credit ought to take the limited risk'.<sup>27</sup> Finally, compensatory remedies were in no way associated with the idea of revenge which would be exacted when the victim's blood was hot, hence, generally, they are perpetual.

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26. Voci, op.cit., p.9ff.

27. Buckland, Textbook, p.534.

We have seen that the actio depositi in factum is thought to have been a penal remedy, that it had certain characteristics, and why it is these characteristics which confirm that the action was indeed penal. At this point we need to be more precise. The scholars referred to in the survey of the literature assert that in origin the actio depositi in factum was penal. Although it is seldom stated<sup>28</sup> this assertion no doubt relies to some extent on the thesis of Levy<sup>29</sup> that in origin all actiones in factum were penal. Many actions which in origin were penal, in developed law exhibited characteristics of compensatory actions: Levy suggests that although these actions had a penal origin they had now come to fulfill a compensatory function. The development of the actio depositi in factum from a penal towards a compensatory remedy is a theme which we have met in the literature on depositum. In this context it is primarily associated with hypotheses concerning the process which led to the introduction of the actio in ius: the civil law remedy was the product of judicial interpretation of the formula in factum. The precise steps of this development are not explored<sup>30</sup>, however, we should note that this is the first stage in which we

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28. But see Burillo, op.cit., p.248.

29. Privatstrafe und Schadensersatz (Berlin, 1915) Cf, Mitteis, ZSS (37) 1916 p.328ff who rejects the thesis that all actiones in factum were penal in origin. However, he accepts the proposition for those actions in factum in which the intentio refers to an unlawful act of the defender, for example, in the form: dolo malo N<sup>i</sup> N<sup>i</sup> factum esse.

30. But see Taubenschlag, Grünhuts Zeitschrift 35(1908) p.135ff.

would expect the original penal features of the action in factum to have been obscured. The second stage is Justinianic. By the time of the compilation of the Corpus Iuris Civilis, depositum was a bona fide contract. However, in presenting their treatment of deposit the compilers used texts which discussed either the action in factum or that in ius. This is not surprising when we remember that it was the former which formed the basis for the juristic commentaries on depositum. Those texts on the action in factum which reflected its penal nature were altered and the penal characteristics expunged. The scholars whose views we have considered differ on the question of which of these two stages was the most important in obscuring the penal features of the action in factum. Taubenschlag believes the first, but the majority believe the second. For example, Rotondi<sup>31</sup>, Burillo<sup>32</sup> and Maschi<sup>33</sup> argue that in the time of Marcellus the action in factum was still noxal. Similarly, Burillo<sup>34</sup> maintains that even as late as Ulpian the liability of joint depositors was cumulative.

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31. Scritti 2, p.53. At p.49 Rotondi approves the observations of Karlowa, R. RG. 2, p.1310 on the differences which existed in classical law between the two deposit remedies. Clearly Rotondi believes that the action in factum was a penal remedy throughout classical law.

32. Op.cit., p.263.

33. Op.cit., p.327.

34. Op.cit., p.265ff.



We are now in the position to present an outline of our own arguments. They are as follows: the XII Tables introduced an independant penal actio depositi in duplum. We cannot be certain what the precise scope of the action was beyond the fact that it was extremely narrow; it may have sanctioned only certain cases of deposits at-arms-length. By this expression we mean deposits made with individuals, such as temple keepers, who hold themselves out as persons with whom to entrust property for safekeeping. The XII Tables did not sanction the common sorts of deposits made between friends.

The actio depositi in factum was introduced before the action in ius and was known to Quintus Mucius Scaevola. It sanctioned a failure to return deposited property in all cases (ordinary deposit) excluding those which were necessary. The latter were deposits made tumultus incendii ruinae naufragii causa<sup>35</sup>, for which the edict provided an action in duplum. This remedy was the application by the praetor of the action of the XII Tables to new circumstances. As regards the action in factum for ordinary deposit, there is no reason to think that it was necessarily derived from the remedy of the XII Tables and that it took over from the latter any of its penal features. This is especially so because the XII Tables was concerned with a particular sort of deposit between individuals who did not stand in a close relationship; the action in factum on the other

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35. See D.16.3.1.1(Ulp. 30 ed.)



hand sanctioned the common case of deposits between friends.

In addition to the introduction of an action in factum for ordinary deposit and the application of the action of the XII Tables to the necessary cases, the edict contained two further provision on necessary deposit. It established an action in simplum against the heir ex dolo defuncti and an action in duplum against the heir ex dolo suo. The provisions preserved in D.16.3.1.1 are not an amalgam of a number of separate edicts issued on depositum at different times. The text reproduces, essentially in its original form, the single edict issued on deposit.

Until the introduction of the action in factum there was no independent legal protection for the common deposits made between friends. The question which this poses is; what remedies, if any, were available to the depositor before the action in factum<sup>36</sup>? In most cases he will have been the owner of the deposited property, in which case he had the vindicatio. From at least the late republic onwards he will also have had the actio furti. Although we do not deal directly with this remedy, it is helpful to record two points. If the depositee made unauthorised use of a deposit, Quintus Mucius Scaevola tells us that

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36. See Gandolfi, op.cit., p.62ff.

he was guilty of theft<sup>37</sup>. Secondly, we accept the conclusions reached by Thomas<sup>38</sup> that a refusal to return a deposit would amount to theft as would infitiatio depositi where there was the necessary mens rea.

An actio furti was available to the depositor, certainly in the case of a failure to return a deposit dolo malo. But, according to accepted doctrine, the action in factum, when introduced, also penalised such a failure to return deposited property. Consistent with its penal nature the action exhibited penal characteristics.

We examine the grounds on which these penal characteristics are attributed to the action in factum and come to the following conclusions: (1) we cannot be absolutely certain whether the action lay intra annum or in perpetuum. The likelihood is that it was perpetual but the texts on which this view is based may have referred to the action in ius. We admit the possibility that the action only lay intra annum but, if so, suggest that this is to be explained by the fact that it was a completely new remedy introduced by the praetor; (2) the action in factum was not noxal but lay de peculio. The evidence we have suggests that this was the case as early as the time of Trebatius; (3) the

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37. Aulus Gellius, Noct. Att., 6.15.2. Itaque Q Scaevola, in librorum quos de iure civili composuit xvi, verba haec posuit: quod cui servandum datum est, si id usus est ..... furti se obligavit.

38. Infitiando depositum nemo facit furtum, Studi Volterra 2, p.759ff.

liability of a plurality of depositors guilty of dolus was not cumulative, nor simply solidary but correal; (4) the action in factum was definitely passively transmissible in classical law and there is no reason to think that the position was otherwise when it was first introduced.

Besides devoting individual chapters to determining the four above mentioned characteristics of the action in factum we also consider the liability of the heir ex dolo suo. The reason for this chapter is that the heir's liability in that case raises certain problems connected with his liability ex dolo defuncti and the liability of a plurality of depositors<sup>39</sup>.

Our last chapter is concerned with the measure of damages in the action in factum. A clear indication that a remedy was penal is that it awarded the pursuer multiple damages. This was not the case in the praetorian actio depositi which we are told lay in simplum<sup>40</sup>. But, even an action which gave only single damages might be penal<sup>41</sup>, and if this were the case, it has been argued that, in principle, damages will have been assessed by reference to the vera

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39. The precise nature of the problems are stated in the relevant chapter.

40. D.16.3.1.1 (Ulp.30 ed.)

41. Or at least the action might be of 'impronta penale'. See Maschi, op.cit., p.190.

aestimatio rei.<sup>42</sup> If in the later history of the remedy the pursuer's interesse came to be considered, a distinction is drawn between the action's penal 'origin' and its 'function' which is now said to be compensatory.

We argue that in the actio depositi in factum damages comprised the vera aestimatio rei but that during the classical period interesse (loss) came to be the measure. However, we suggest that this change merely reflects a more refined means of assessing the pursuer's loss and should not be associated with ideas of the action's penal 'origin' and later compensatory 'function'.

What do our conclusions tell us about the actio depositi in factum? The characteristics of the action are not those ascribed to it by the communis opinio. It lay de peculio, it was passively transmissible and the extent of liability of a plurality of deposites and the measure of damages are features which suggest that it was essentially a remedy by which the pursuer claimed compensation for his loss; it was not primarily a means by which an offender was punished. In view of the other characteristics of the action, if it did in fact also lie in perpetuum, the likely reason is that its purpose was compensatory.

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42. Kaser, Q.E.R.E., who follows, in large part, Levy, Privatstrafe und Schadensersatz. Their arguments, as developed here, especially as they might affect the actio depositi in factum, are an oversimplification. For a more detailed treatment, reference should be made to the relevant chapter.

The implications of the conclusion that the action was reipersecutory differ depending on what point in time the action in factum acquired the characteristics which it certainly had in classical law. If in origin it was penal we must accept that its development into a very different sort of remedy was accomplished extremely early on in its history and has left no trace.

However, we have suggested that there is no evidence to think that the characteristics of the action were different when it was first introduced. If this were the case it throws into doubt the accepted ideas on the early history of depositum; in particular the idea that when first introduced the action in factum was a delictual remedy.<sup>43</sup> This raises the question, how is it that an action of the sort we envisage came to be introduced by the praetor in the late republic? A convincing explanation has recently been offered by MacCormack<sup>44</sup> who traces the early development of the transactions which in classical law were classified as the real contracts; namely mutuum, commodatum, depositum and pignus. Their legal recognition is to be explained by the existence of a (real) debt between the parties to the transaction. The transfer of property, which in this

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43. We do not assert this point unequivocally. We still need to study the precise operation of the action and the full implications in practice of the depositor's liability for dolus, neither of which is attempted here.

44. Gift, Debt, Obligation and the Real Contracts (unpublished); but cf. Nicholas, An Introduction to Roman Law (Oxford, 1962) p.168f who argues that a real debt is established only in the case of mutuum.

context was made between friends and neighbours, imposed an obligation on the recipient to return either the same property or its equivalent sometime in the future. The existence of such a debt in time was seen by the law as a sufficient ground for the creation of a legal obligation. In the case of mutuum, which was the first of the transactions for which a legal remedy was provided, the debt was enforced by the condictio. Ownership of the property in this case is transferred to the borrower and the formula states in the dare oportere the fact that [its equivalent] is owed to the lender.

Deposit is not a typical example of debt because ownership of the property is not transferred to the deposittee. Therefore, in most cases the depositor will have had a claim on the deposit in the vindicatio which asserted his ownership of it. However, not only are there difficulties associated with proving ownership, but in certain cases the deposittee will no longer have been in possession of the object. As a result the action in factum was introduced<sup>45</sup> which established an obligation to restore the property also in this case. The obligation is grounded upon the receipt of property and its content is to restore what was received. This is directly reflected

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45. But see Watson, The Notion of Equivalence of Contractual Obligation and Classical Roman Partnership, LQR 97 (1981) p.275ff at p.277.

in the formula<sup>46</sup> which states that the two conditions for the availability of the remedy are, (1) the fact that a deposit was made (deposuisse) and (2) that it has not been returned (redditam non esse). The important point for our purposes is that this analysis establishes that 'the receipt of the [deposit] sets up a debt with respect to that specific property in the sense that it is regarded as owed to the person from whom it was received'. The action in factum was the means by which this debt was enforced; the means by which the deposit or its value was recovered.

A difficulty with his approach is that the formula in factum does not say redditam non esse but dolo malo redditam non esse. Dolus on the part of the deposittee appears as a necessary precondition of the availability of the action. How does this fit in with the idea that a debt is established between the parties simply on receipt of the property? The answer is that the restriction of liability to dolus was a concession to the deposittee. This is clearly stated by Ulpian in D.13.6.5.2<sup>47</sup>.

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46. Gaius, 4.47 ..... Si paret Aulum Agerium apud Numerium Negidium mensam argenteam deposuisse eamque dolo malo N. N. A. A. redditam non esse, quanti ea res erit, tantam pecuniam iudex ..... condemnato.

47. See Michel, Gratuité en Droit Romain (Brussels, 1962) p.61ff.



D.13.6.5.2 (Ulp.28 ed.) Nunc videndum est, quid veniat in commodati actione, utrum dolus an et culpa an vero et omne periculum. Et quidem in contractibus interdum dolum solum, interdum et culpam praestamus: dolum in deposito: nam quia nulla utilitas eius versatur apud quem deponitur, merito dolus praestatur solus .....

However, if the depositee was in fact guilty of dolus, was he then penalised in the action in factum in the manner suggested by the communis opinio<sup>48</sup>? The conclusions which we reach concerning the characteristics of the action suggest that this was not the case<sup>49</sup>.

We have now identified the issues with which this thesis is concerned. But, before dealing with them directly, we present a general analysis of D.16.3; the Digest title on depositum.

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48. This view is put forward most forcibly by Jhering, De La Faute en Droit Privé, Études Complémentaires de L'Esprit du Droit Romain, trans. Meulenaere, (Paris, 1880) p.34ff; and Pernice, Labeo 1, p.435ff. See also, Kaser, R.P.R.1, p.535.

49. But see n.43 above. We do not mean to suggest that there were no consequences of the fact that the depositee was liable only for dolus. Therefore, the action in factum may have been infaming and, if so, in this respect was clearly penal. However, this does not mean to say that the action exhibited the characteristics ascribed to it by the communis opinio. We will see that the actio depositi in ius was definitely infaming yet no-one would classify it as a penal remedy.

CHAPTER II

THE CONSTRUCTION OF D.16.3 DEPOSITI VEL CONTRA

### THE CONSTRUCTION OF D.16.3 DEPOSITI VEL CONTRA

As regards its construction, the Digest title on depositum can be divided into two distinct halves: (a) the prefatory section which comprises D.16.3.1-10 and (b) the remainder of the title. In this chapter, besides looking at the way in which these two halves have been put together, we shall also consider the palingenesia of those texts found in the title which are not taken from works on depositum.

We begin with the construction of the prefatory section to D.16.3. Our aim is to determine how it is put together and in what ways it differs from the remainder of the title. This study should clarify what we mean by the term 'prefatory section', and, in addition, will provide a detailed illustration of the methods adopted by the compilers at the editorial stage of the compilation of the Digest. It was in fact at this stage that the main bulk of the actual construction of the title - that is the re-arrangement of the texts from the order in which they were excerpted - took place. However, as we shall see, this does not mean that we shift the focus completely away from the excerpting stage of the compilation, for, in one respect, the methods of the compilers at this stage is of relevance to the construction of the prefatory section.

According to Krüger D.16.3. contains excerpts from all four masses as follows:<sup>1</sup>

SABINIAN MASS: 1-3,5,7,10,11,12-18.

EDICTAL MASS: 4,6,9,19-23,32.

PAPINIAN MASS: 8,24-31.

APPENDIX: 33,34.

Before the editing of the texts excerpted for inclusion in D.16.3. the texts stood within the individual masses in an order different from that in which they are now found in the title. A knowledge of this original order within the masses, which is the order in which the texts were excerpted, is crucial to an appreciation of the way in which D.16.3. came to be constructed by the compilers. It is only by a comparison of this order with the order in which the texts appear in the Digest title itself that we can determine the extent of the editorial activity relative to the title. According to Krüger the texts originally stood in the masses in the following order:

SABINIAN MASS: 11,12,1,2,3,5,7,13,14,15,10,16,17,18.

EDICTAL MASS: 6,9,19,20,21,4,22,32,23.

PAPINIAN MASS: 8,24,25,26,27,28,29,30,31.

APPENDIX: 33,34.

The texts marked by Krüger as out of order within the title are:<sup>2</sup>

SABINIAN MASS: 10,11,12.

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1. Stereotype Digest, p.242 n.14.

2. Op. cit., p.242 n.14 marked with an asterisk.

EDICTAL MASS: 4,6,9,32.

PAPINIAN MASS: 8.

The way in which a text is recognised as out of order can be illustrated from the large table above: text 10 from the Sabinian mass is out of order within its own mass. The number 10 represents its position within the Digest title, the above table its original position within the mass. So we see that the text which is now D.16.3.10, as excerpted (i.e. before editing), stood between what is now D.16.3.15 and 16.

This is quite straightforward. But the reason why text 8 from the Papinian mass is out of order is not so immediately evident from the table. The masses followed each other within the title in the order given, but 8, rather than appearing along with the main body of the Papinian mass, in fact appears within the Sabinian mass. For this reason it is out of order even although it is in order relative to its own mass. When the terms 'transposed' and 'transposition' are used in future we therefore refer to the method by which the compilers effected the substantial proportion of the construction of the title by moving texts at the editorial stage of the compilation within their own mass, and from one mass to another<sup>3</sup>. Finally in this respect, it should be noted that Krüger's list of displaced texts is incorrect because Honoré has pointed out that 1-7 of the Sabinian mass have

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3. For a full discussion of, the different types of transposition see Honoré, *The Editing of the Digest Titles*, ZSS 90 (1973), p.262ff at 266ff.

been transposed within their own mass as a prefatory block - this should be viewed as a single transposition of a block instead of the two separate transpositions of 11 and 12<sup>4</sup>.

We are now in a position to make a preliminary observation on the prefatory section. All transpositions in the title - excepting D.16.3.32 - are effected either by the alteration of the order of the texts in the Sabinian mass itself or by the introduction of texts from the other two main masses into the Sabinian mass. The character of the Sabinian mass taken as a whole is therefore very different from that of the other two main masses. However, all the transpositions - again excepting D.16.3.32 - do in fact pertain to the first ten texts of title, and, as will be shown, these texts constitute the prefatory section of D.16.3. This underlines the importance placed on the opening section of the title because transposed texts are the evidence of the constructional activity on the part of the compilers at the editorial stage of the compilation. It also results in the division of D.16.3. into two distinct parts because the remaining two thirds of the title (including what is left of the Sabinian mass) consists entirely of texts in the order in which they were excerpted. Any substantial contrast in D.16.3. is therefore that between the prefatory section and the remaining part of the title and not that between the masses inter se.

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4. Op.cit., p.290.

We have already noted that texts 1-7 of the Sabinian mass were transposed to appear at the beginning of the title. Consequently this begins with an extract from Ulpian 30 ad edictum.

The interesting feature of this opening extract is its length. In D.16.3.1.1-7 Ulpian records and comments on the provisions of the edict; D.16.3.1.8-26 consists of a commentary on the formula in factum and the formula in ius, and thereafter there is a consideration of a number of diverse problems arising out of the contract<sup>5</sup>. In all D.16.3.1 runs to a length of 47 subsections and stands as the longest text by far in the title. Yet Ulpian's work was being read concurrently with, inter alia, Paul ad edictum and Gaius ad edictum provinciale<sup>6</sup>. So although there was undoubtedly a high degree of overlap with these works it is perhaps surprising that no extract from them is found before sub-section 47. However, in view of the substance and relative length of the extract it is clear that it was excerpted with a view to its forming the introduction to the title. By beginning D.16.3 with this long uninterrupted piece from Ulpian's edictal commentary the compilers were able to give a simple yet comprehensive

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5. Lenel, Pal. 2, p.612f.

6. See the table given in appendix one of Honoré, Tribonian (London, 1978), which is Honoré's amended version of Kruger's ordo librorum found at the back of the stereotype Digest.



statement of the essentials of the contract<sup>7</sup> with the advantage of absolute continuity in that the extract comes from a single work<sup>8</sup>.

In the next part of the prefatory section, D.16.3.1.47 - D.16.3.4, we find a grouping of texts according to subject matter in which the discussion concerns the innocent disposal by the heir of property deposited with the deceased. That D.16.3.2, 3 and 4 are intended as developments on D.16.3.1.47 is immediately suggested by the fact that they refer back to 1.47 for their subject - the heres. However, before considering the way in which these texts are put together it is necessary to deal with an ancillary problem arising from the inscription of D.16.3.3.

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7. See Schulz, Roman Legal Science (Oxford, 1946) on the edictal commentary. Also, Ulpian 30 ad ed. dealt with both deposit and fiducia and hence the treatment of each was necessarily restricted.
  8. There were two opportunities for D.16.3.1. to be divided up by the introduction of pieces from other works: at the excerpting stage with extracts from works being read concurrently with Ulp. 30 ad ed., and at the editing stage with a number of the other texts excerpted for inclusion in this title. However, Ulpian's original has undoubtedly been subject to some emendation by the compilers; see Maschi, La Categoria dei Contratti Reali (Milan, 1973), p.313ff and the references he gives. But this is likely to have taken the form of simple abbreviation, not actual re-arrangement of the original.

The inscription of D.16.3.3 tells us that it is taken from Ulpian 31 ad edictum, mandati vel contra. This, however, is thought to be wrong by Lenel who places the fragment in Ulpian 30 ad edictum, depositi vel contra<sup>9</sup>.

Of the two arguments that can be advanced against Lenel's emendation neither is well founded. Firstly a strict interpretation of Ulpian's statement in D.16.3.3 can be seen as a qualification of the non tenebitur de re rule expressed in D.16.3.1.47. Why was this rule framed in such unequivocal terms if Ulpian was himself then immediately to qualify it? The seeming conflict can best be understood as resulting from the application to deposit in D.16.3.3 of a rule formulated in another context. Secondly, it is further stated by Ulpian in D.16.3.3 that the heir who is in the position to buy back property sold but who does not wish to do so is not free from culpa. It is a commonplace that in the absence of agreement to the contrary the depositee was liable for dolus alone<sup>10</sup>. Therefore, a text which asserts the liability of the heir

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9. Pal. 2, p.617 n.2.

10. Longo, Il Deposito (Milan, 1946), p.15f.

for culpa must prima facie be out of place and is better seen in the context of mandate from where after all the inscription tells us it comes<sup>11</sup>.

These points can be dealt with in turn: in D.16.3.1.47 Ulpian is reporting the opinions expressed by other jurists on the question of the heir's liability in the actio depositi where he has innocently sold the deposit.<sup>12</sup> Firstly this is suggested by the introduction of the discussion by quaesitum est. In view of the use of the comparative verius in the expression of the decision on the secondary theme of liability for price, the quia dolo non fecit, non tenebitur de re rule has the appearance of being the reproduction by Ulpian of a widely accepted

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11. Liability in the actio mandati in early law was for dolus; Buckland, Textbook of Roman Law, 3rd ed., p.516. But certainly by the time of Ulpian this had been relaxed in certain circumstances to include liability for culpa in its restricted sense; Watson, Contract of Mandate in Roman Law (Oxford, 1961), p.195f. Hence a reference to culpa made by Ulpian is prima facie best viewed in the context of mandate rather than deposit where a similar relaxation did not take place.
  12. The authenticity of the text has been attacked on a number of points; Index Intp., p.272. In particular see Ferrini, Storia e Teoria del Contratto di Commodato nel Diritto Romano, in Opere 3, p.81ff at p.105, who argues that the whole group, D. 16.3.1.47 - 16.3.3 originally dealt with fiducia. This hypothesis is supported by Rotondi, Scritti 2 at p.99 and p.129. However the argument has been amply refuted by De Ruggiero, Depositum vel Commodatum, BIDR 19, 1907, p.5ff at p.46f. De Ruggiero further shows that the reference to commodatum in 1.47 is interpolated. The texts therefore dealt with deposit alone.

decision. The view that Ulpian is concerned here with recording the opinions of others is substantiated by the fact of his use of the comparative in the phrase et verius est teneri eum occurring in the second half of the text. This rule represents what is to Ulpian the best of the conflicting opinions expressed upon this point. Once the observation is made that 1.47 does not necessarily fully reflect Ulpian's own opinions the relationship between 1.47 and 3 becomes clear: D.16.3.3 is Ulpian's own qualification of a rule formulated by others which he was reproducing in D.16.3.1.47. Hence there is no conflict between the two texts in the sense previously suggested.

With regard to the reference to culpa, - this can be used as a generic term. That is, not only does culpa denote a restricted understanding of fault in the sense commonly associated with negligence, but it can also denote a wider conception of fault - fault which includes dolus.<sup>13</sup> The content of culpa in this context can be determined from the illustration quemadmodum.... vendiderit. Ulpian draws an analogy between the position where the heir is unwilling to buy back property which he has sold and where he has bought back property but is unwilling to return it. The heir's unwillingness to buy back property is therefore treated as a refusal to give back per se. The fact that

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13. MacCormack, Culpa, SDHI 38 (1972), p.123ff. See also, Id., The Liability of the Mandatory, Labeo 18 (1972), pp.156ff.

the property was once sold innocently is no excuse in either case. Culpa in this text can therefore only be understood in the wide sense outlined above, which is fault inclusive of dolus.<sup>14</sup> But, to show that culpa must be viewed as inclusive of dolus here perhaps does not in and of itself prove that the text is not from a book on mandate. However, this is extremely unlikely given the very close connection that D.16.3.3 has with 1.47. The inference is strongly in favour of their both having been taken from the same book of Ulpian ad edictum. The mistake in the inscription of D.16.3.3 is clearly due to the fact that it is preceded by an extract from Paul 31 ad edictum, - the 31 being carried over in error by the scribe to the next text (D.16.3.3)

Turning again to 1.47, we argued that D.16.3.3 is Ulpian's own qualification of a rule formulated by others which he was reproducing in the first half of 1.47. Why then do we not find the qualification occurring in the title before its present position at D.16.3.3? As a qualification we should expect it to have followed immediately after the non tenebitur de re rule rather than later on in the title.

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14. Alternatively, see Rotondi, Scritti 2, p.99.

The explanation for this lies firstly in the structure of 1.47 itself. In his original work, for some reason, Ulpian reported the non tenebitur de re rule, then the discussion of liability for price, and only then appended his own qualification to the de re rule. This arrangement can best be understood by assuming that Ulpian was lifting this part of his work directly from a source. It was in the source that the discussion progressed from a consideration of de re to liability for price. For Ulpian to have interposed his own qualification immediately after de re would have done damage to the development of the discussion in the text which he was lifting from his source, and, for this reason, we find that Ulpian has appended the qualification after the latter part of 1.47.<sup>15</sup> The compilers, however, at the excerpting stage of the compilation, were reading Paul 31 ad edictum concurrently with Ulpian 30 ad edictum. They reached the discussion of liability for price before Ulpian's qualification of non tenebitur de re, and, as there was found in Paul ad edictum a pertinent qualification of the price rule which was missing from Ulpian's work, this was inserted immediately after the discussion of liability for price of 1.47. Hence the relative positions of D. 16.3.2 and D. 16.3.3 in the title and the latter text's displacement from the rule which it qualifies.

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15. In fact it is simply easier to append after the discussion in the source rather than to bother with alterations of the original.

The next and last text in this group is D. 16.3.4 (Paul 5 ad Plautium), a displaced text which develops the point made in D. 16.3.2 (Paul 31 ad ed.) It has been taken from the edictal mass and introduced into this section of the title because it states that rules formulated to deal with the innocent disposal of a deposit by the heir were extended to cover innocent sale of a deposit by anyone, so long as he thought himself heir.

This small group of texts illustrates well the methods of the compilers: an opinion reported by Ulpian in 1.47 is subject to qualification in D.16.3.2 by the insertion in the title, from a book of Paul being read concurrently with Ulpian 30 ad ed., of a statement missing in Ulpian's work. D.16.3.4 is transposed from the edictal mass because it contains a further development on the same theme which must have been missing from both of the edictal commentaries. Note that the position of D.16.3.2 in the title was fixed at the time when this group of works was excerpted, whereas the position of D.16.3.4 was fixed at the later editorial stage of the compilation. All four texts are closely connected on the basis of their subject matter. However, the two themes of liability for price and liability for property within the group are not consistently developed in the title due to the internal structure of D.16.3.1.47. To have effected a strictly consistent development of these themes would have



necessitated the re-arrangement of Ulpian 30 ad ed. itself which was seen by the compilers as outwith their task. Notwithstanding this irregularity the texts within the group have the appearance of having been built one upon the other which naturally leads to the subject matter grouping which we find.

From this subject matter grouping the title proceeds to a brief statement on the contrarium iudicium in D.16.3.5pr. and then to a further subject matter grouping in D.16.3.5.1-7pr. where sequestum is discussed. It is tempting to view D.16.3.6 - in that it speaks in terms of sequestum est as having been introduced by the compilers from the edictal mass as a general definition of sequestum. As such we would normally expect it to come before the discussion of the institution to which it relates. But in this case 5pr. deals with the counter action on deposit and therefore to have placed 6 before 5 would have meant that 5pr. acted as a break in the discussion of sequestum. But this raises the question, why did the compilers not cut this extract from Ulpian ad edictum between 5pr. and 5.1 in which case D.16.3.6 would have stood first in the discussion of sequestum? Beyond the fact that the small extract (5pr.) on the contrarium iudicium would then have stood alone in this part of the title, the most likely explanation is that Ulpian 30 ad edictum was viewed as the principal work and basis for the prefatory section. A transposition was therefore intended

to be complementary to points raised in this work and it could not itself introduce a change in subject matter within the section.<sup>16</sup>

The character of this grouping on sequestum is different from that previously discussed. Firstly there is only one extraneous text and this is not closely associated with any of the other texts within the group. Also there is no immediate association between the two halves of Ulpian 30 ad ed. (i.e. 5.1 and 2 on the one hand and 7pr. on the other). Therefore while the texts are grouped on the basis of sequestum they do not give the appearance of having been built one upon the other as in the preceding grouping.

The next part of the prefatory section has an interesting construction: it appears that D.16.3.8, 9 and 10 are dependent on the subjects discussed by Ulpian in D.16.3.7. D.16.3.7.1 deals with the heir's liability for the dolus of the deceased, 7.2, 7.3 and D.16.3.8 with the depositor's privileged claim against the property of the argentarius and D.16.3.9 and 10 again with the heir's liability for the dolus of the deceased. This arrangement therefore appears to show that there was not always a

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16. For an alternative explanation of the intended function of D.16.3.6. (Paul 2 ad ed.); see, Brogini, Introduction au Sequester, Mélanges Meylan 1, p.43ff according to whose argument D.16.3.6 would not be offered as a general definition of sequestum.

consistent progression from one subject matter grouping to another in the prefatory section because the consideration of the depositor's claim against the argentarius is interposed in sandwich manner between the two discussions of the heir's liability to the actio depositi. How is this odd arrangement to be explained?

D.16.3.7 did not stand in the original as it does in the Digest. In particular, Ulpian in his original work (i.e. before it was excerpted), discussed the heir's liability to the condictio ex causa furtiva between what is now 7.1 and 7.2<sup>17</sup>. By the sandwich arrangement the compilers cannot therefore have been wishing to avoid doing damage to the construction of the original fragment. Consequently we would expect D.16.3.9 and 10 to have been appended immediately after 7.1 on which they are a development. There is a certain amount of duplication between 7.1 and D.16.3.9 in the sentences plures... heres est and in depositi actione... agere debeo from which it is arguable that the position in the title of D.16.3.9 and 10 is an oversight on the part of the compilers. But

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17. It is necessary to distinguish the condition of Ulpian 30 ad ed. before and after excerpting. Before excerpting there was a discussion of the condictio ex causa furtiva between what is now 7.1 and 7.2; see Lenel, Pal. 2, p.617. This, however, was removed from here at the excerpting stage for inclusion in D.13.1. It therefore did not appear in the material excerpted for the title on deposit with which we are dealing.

D.16.3.9 (Paul 17 ad ed.) has in fact been transposed from the edictal mass and therefore must have been introduced precisely as a development on Ulpian 7.1.

It is also arguable that the explanation for this arrangement lies in the fact that the compilers saw a connection between 7.1 and 7.2 which they were unwilling to break up by the interposition of D.16.3.9. This would suggest that D.16.3.9 did not express the connection that 7.1 did between the case of the heir and the argentarius. In 7.1 Ulpian says quamquam enim alias ex dolo defuncti non solemus teneri. That is, usually as heir we are not liable for the dolus of the deceased but deposit is a special case in that the dolus ex contractu reique persecutione descendit. Similarly deposit is treated as a special case in 7.2 relative to the property of the argentarius. It might be this point of similarity between these two cases which explains the construction of the group.

However, there is an alternative explanation which is preferable. Honoré has argued that the excerpts made by the compilers were on separate pieces of papyrus or parchment<sup>18</sup>. What now constitutes D.16.3.7 would therefore have appeared in whole on a single sheet. So,

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18. Editing of the Digest, p.264 and n.10.

to have inserted D.16.3.9 and 10 between 7.1 and 7.2 to effect a consistent development of the discussion of the heir's liability would have necessitated the division of this sheet. A simple enough task but one which the compilers, who were working to a strict timetable<sup>19</sup>, were not prepared to execute. In fact there are indications to suggest that the whole of the extract from Ulpian 30 ad ed., including D.16.3.2 (Paul 31 ad ed.), which was from a work being read concurrently with Ulpian ad ed., appeared on a single sheet before editing. D.16.3.7 is in fact the last extract from Ulpian 30 ad ed.<sup>20</sup>, so, rather than dividing the sheet on which the text appeared, it was much easier simply to add all the extraneous texts at the end<sup>21</sup>.

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19. Honoré, op.cit., p.273f.

20. In so far as D.16.3.13 and 14 are from Paul ad ed. and Gaius ad ed. provinciale respectively they might initially have appeared on this large sheet. Either they did not or they were removed when 1-7 of the Sabinian mass was transposed as a prefatory block.

21. Note, however, that an extraneous text is added at the end of the group to which it relates in the case of D.16.3.4, whereas in terms of a consistent development of the discussion an earlier placing might have been warranted. Was there a tendency on the part of the compilers to append extraneous texts at the end of their respective groups? The case of D.16.3.6 can be explained by the fact that it was introduced as a general definition as previously outlined. Such a point would need to be verified (or otherwise) by a broader study than that attempted here.

Therefore, in D.16.3.7.1 is discussed the heir's liability to the actio depositi ex dolo defuncti, and, in 7.2 and 7.3, the depositor's privileged claim against the bankrupt nummularius. D.16.3.8 is transposed from the Papinian mass because it develops the discussion initiated in the latter part of D.16.3.7, stating that the depositor may extend his privileged claim, not only over the remainder of his deposit, but over all remaining property of the fraudulent argentarius. For reasons adduced earlier, D.16.3.9 is transposed from the edictal mass as a development on a discussion initiated in 7.1. Finally D.16.3.10, which is out of order within its own mass, has been shifted because it expresses the rule implicit in the preceding text.

This concludes the study of the prefatory section of D.16.3. In that D.16.3.10 is a development on a discussion initiated in 7.1 the prefatory section of the title comprises D.16.3.1-10. The factor which determines the end of this section is the end of the extract from Ulpian 30 ad edictum. The compilers have used this work as the basis for the prefatory section; the order of treatment is the order of that work and all transpositions are complementary in some way to the principal work. We



see that the prefatory section comprises a long uninterrupted extract from Ulpian 30 ad ed. followed by a series of texts which can be divided into subject matter groupings. The groupings are the result of a methodical progression from the consideration of one subject to another naturally following the development of Ulpian ad ed. Where there is a derogation from this practice it is due to the fact that the excerpts were copied in whole on pieces of parchment as indicated by Honoré. The fact that the division of these in the interest of greater continuity was not seen as worthwhile supports the theory that speed was a pressing consideration<sup>22</sup>.

As regards the origin of the texts in the prefatory section which do not come from works on depositum, D.16.3.9 is taken from Paul 17 ad edictum; de interrogationibus in iure faciendis<sup>23</sup>. In the interrigatio of the heres of a debtor, 'the plaintiff asked whether and for what share the defendant was heres'<sup>24</sup> with a view to

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22 Honoré, op.cit., p.273f.

23. Lenel, Pal. 1, p.994.

24. Buckland, Textbook of Roman Law, p.633. See also, Lenel, Edictum Perpetuum, p.145.



determining the extent of his personal liability. It is precisely with the extent of the heir's personal liability that D.16.3.9 is concerned. Paul says that ex facto defuncti the heir is liable pro parte hereditaria. Alternatively should it become clear that it was the heir himself who was the guilty party we are told that he should be sued in solidum (pro parte non ago).

D.16.3.10 (Iulianus 2. ex Minicio) has an interesting palingenesia. It is taken from a title de servitutibus of that work and is tentatively associated with D.8.5.4.4.(Ulp. 17 ad ed.) by Lenel<sup>25</sup>. We know that Julian ex Minicio was a lemmatic commentary<sup>26</sup> and it is therefore probable that D.16.3.10 formed part of a note by Julian on an opinion of Minicius. In D.8.5.4.4. it is stated that the (actio confessoria) can be brought against either co-owner of servient land. On the other hand in D.16.3.10 it is said that the (actio depositi) can only be brought against the fraudulent co-heir, nec adversus coheredes eius, qui dolo carent. The contrast between the two cases arises from the fact that the claim

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25. Lenel, Pal. 1, p.485.

26. Schulz, Roman Legal Science, p.217.

in the actio confessoria is in rem, the intentio of the action asserting the pursuer's right to the praedial servitude without making mention of the defender. As a result the action can be brought against either co-owner of the servient land. However in the actio depositi the claim is in personam and an allegation of dolose behaviour on the part of the defender appears in the intentio as an essential feature of the action.<sup>27</sup> Therefore in the case under discussion the actio depositi can only be brought against the fraudulent co-heir. It is likely that Julian wished to draw attention to the contrast between this action in rem and an action in personam.

We now come to look at the construction of the remainder of the title whose character is best appreciated by means of a contrast with the prefatory section. All except one of the remaining texts appear in the title in the order in which they were excerpted; no arrangement of them has been attempted and hence they appear simply as an unconnected string.<sup>28</sup> The only text out of order is D.16.3.32 (Celsus

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27. The action is in factum; cf. Gaius, 4.47.

28. Except the connection between those texts from works read concurrently; viz., D.16.3.13. and 14.

11 Dig.) which, according to Honoré,<sup>29</sup> is a coda of two or more masses. If Honoré's suggestion is correct<sup>30</sup> it means that the text finds its position through rejection from the main body of the title, not through any considered placement. Any 'positive construction',<sup>31</sup> effected by the compilers in D.16.3 therefore pertains only to the prefatory section. The result is that the main interest provided by the remainder of the title concerns the palingensia of the texts which it comprises.

D.16.3.11 (Ulp. 41 Sab.) and D.16.3.12 (Pomp. 22 Sab.) are from a group of works read concurrently by the compilers.<sup>32</sup> As excerpted the texts were the first of the Sabinian mass and their present position in the title is due to the transposition of the prefatory block,

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29. Op. cit., p.290. See also p.266 and p.282 for an explanation of the term 'coda'.

30. See the discussion of this text which follows.

31. Rejection of a text from its original position is, of course, a form of construction, but not in the sense of the introduction of an extraneous passage into a new context in order to develop a discussion already found there.

32. See Honoré, Tribonian, p.258.

D.16.3.1-7. D.16.3.13 (Paul 31 ed.) and D.16.3.14 (Gaius 9 ed. prov.) are also from works read concurrently by the compilers. In addition it is worth noting that the books from which these two texts come were being read concurrently with Ulpian 30 ad edictum, the book from which the prefatory block was taken.<sup>33</sup> However, unlike D.16.3.1-7, D.16.3.13 and 14 were not transposed as part of the prefatory block.

As regards the palingensia of these texts; D.16.3.13 and 14 are both taken from sections on depositum of their respective works. On the other hand D.16.3.11 (Ulpian 41 ad Sabinum) comes from a book de furtis.<sup>34</sup> Huvelin<sup>35</sup> argues that the discussion in the passage was centered on the general question of infinitio depositi and that Sabinus in his original work was concerned with the

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33. Honoré, Tribonian, p.258.

34. Lenel, Pal. 2, p.1166.

35. Furtum (Lyon/Paris, 1915), p.710ff.

conditions under which this constituted theft.<sup>36</sup> The origin of the text in a book on furtum is therefore quite unproblematic.

According to Lenel D.16.3.12 (Pomponius 22 ad Sabinum) is from a book de condictione; D.16.3.12pr.-2 being taken from that part of the book which deals with the actio de eo quod certo loco.<sup>37</sup> The formula of this action is based on that of the condictio<sup>38</sup> which explains why it should appear in this book. But, as regards depositum, the matter is more complicated.

The actio de eo quod certo loco gave the iudex discretion to determine what allowance was to be made where what was due in one place was sued for in another;<sup>39</sup> where, for example, a fixed sum of money payable at Ephesus was claimed at Rome. The use of this action was necessary

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36. For a recent treatment of infinitio depositi, see Thomas, Infinitando depositum nemo facit furtum, Studi Volterra 2, p.759ff.

37. Pal. 2, p.132.

38. Lenel, E.P., p.240ff.

39. Buckland, A Textbook of Roman Law (3rd ed.), p.660.

because the interest payable on that sum might be higher at Rome than at Ephesus<sup>40</sup> and if the pursuer proceeded simply with the unamended actio certae creditae pecuniae he would be guilty of plus petitio loco.<sup>41</sup>

However Dumas has pointed out that the formula of actions in factum differs from that of the condictio in two respects important in this context.<sup>42</sup> Firstly, he observes that as a general rule<sup>43</sup> plus petitio loco was not possible in an action in factum. To take the example of depositum: the essential point which the formula directs the judge to consider is whether the deposit has not been returned due to the dolus of the depositor.<sup>44</sup> The defender in this action cannot claim that an intentio framed eamque dolo malo redditam non esse is inaccurate

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40. Cf. D.13.4.3 (Gaius, 9 ed. prov.)

41. Cf. Gaius, 4.53c.

42. L'Action de eo quod certo loco dari oportet en droit classique, NRH 1910, p.610ff at p.638ff.

43. The exception being the actio de pecunia constituta; op. cit., p.640f.

44. Cf. Gaius, 4.47

simply because it does not specify the place agreed upon for the return of the property.<sup>45</sup> If the object has not been returned dolo malo in Rome where the action is brought, clearly it cannot have been returned at Ephesus which was the place agreed upon for surrender.

The second difference identified by Dumas between the formula of the condictio and actions in factum is that the latter actions have an uncertain condemnatio of the type quanti ea res est. In circumstances where the return of the property was demanded in a place other than that agreed upon, the q.e.r.e. gave the judge sufficient latitude to enable him to place a value on the interests of the parties without recourse to a special formula like that of the actio de eo quod certo loco.

The discussion in D.16.3.12 opens with a statement that where a deposit was made in Asia to be returned at Rome the expense was deemed to be the depositor's (12pr.) D.16.3.12.1 states that a deposit is to be returned at that place where, in the absence of dolus on the part of the deposittee, the property is now to be found; where it was in fact deposited makes no difference. One way of looking at the texts is as follows: if the pursuer raises

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45. See Dumas, op.cit., p.640.



an action in the place where the deposit was made (Rome) effectively he is claiming in a place different from that where the deposit is due (where it is now to be found). This interpretation would explain why the text was taken from a discussion of the actio de eo quod certo loco were it not for the fact that it is difficult to determine the nature of the allowance which the judge was supposed to take account of in this case. D.16.3.12.1 subsequently also proceeds to raise the question of expenses. It states that if the pursuer wants the property to be conveyed to Rome at his own expense and risk he is to be heard.<sup>46</sup> Yet, prima facie, rather than an allowance being made by the judge in the direct action, the appropriate remedy to reclaim, not only these expenses, but also those mentioned in the principium, would be the contrarium iudicium.<sup>47</sup>

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46. Gandolfi, Il Deposito, (Milan, 1976), p.136f believes that the depositum would be condemned in the actio depositi if, once the depositor had agreed to undertake the expense and risk, he refused to transport and give the property back in Rome.

47. Notwithstanding the reference to the bonae fidei iudicia the discussion originally concerned the actio depositi in factum. See Gandolfi, op.cit., p.136, also D.13.4.7 (Paul 28 ed.)

An alternative approach is to assume that the discussion in D.16.3.12pr. and 1 did not directly concern problems of the same nature as those dealt with in the actio de eo quod certo loco. If we look at the Digest title de eo quod certo loco oportet (D.13.4) we see that it is primarily devoted to this action. Parts of it, however, discuss problems of a more general nature arising out of agreements for payment at a specific place. For example, D.13.4.2.5 (Ulp. 27 ed.) states that if a person stipulates for a set of flats to be built, without adding the place where, the stipulation is void. Similarly in D.13.4.2.6 we are told that where a man stipulates at home for something to be given at Carthage on the same day, the stipulation is inoperative. Possibly D.16.3.12 pr. and 1 should be viewed in the same way. They discuss a problem of a general nature arising out of an agreement for performance at a specific place; viz, who pays the expenses where a deposit is to be returned at a different place from where it was made (12pr.) or where it is now found (12.1).

The issue, as it concerns D.16.3.12.2, is more straight forward. The text discusses sequestrium and is linked by Lenel to D.16.3.5.1.<sup>48</sup> This latter text discusses a case where it is agreed with the sequestrator that he should produce the deposit at a specified place and he does not.

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48. Pal. 2, p.132 n.3.

The iudex is in the position where he has to evaluate any interest the parties might have in the fact that the actio depositi has to be raised elsewhere from the place agreed upon for the return of the property.

Finally D.16.3.12.3 draws an analogy between the position of the defender in an actio ex stipulatu or actio ex testamento and the defender in an actio depositi as regards periculum after litis contestatio. The origin of this discussion in a book de condictione therefore raises no difficulties.

The next section, D.16.3.15-18, which takes us to the end of the Sabinian mass, presents no constructional problems. The texts appear in the Digest in the order in which they were excerpted and each deals with issues which are in no way interrelated. D.16.3.15 (Julian 13 digestorum) and D.16.3.17 (Florentinus 7 institutionum) are taken from sections on deposit in the works cited.<sup>49</sup> In D.16.3.16 (Africanus 7 quaestionum) we are told that the depositor is released by the surrender to the depositor of his right of action against a sub-depositee. The discussion is therefore in keeping with the origin of the text in a

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49. Lenel, Pal. 1, p.353 and p.173.

section entitled de solutionibus et liberationibus.<sup>50</sup>

Finally, D.16.3.18 (Neratius 2 membranarum) is taken from a collection of quaestiones and responsa which are not arranged in any systematic order.<sup>51</sup>

The next group of texts, D.16.3.19-23, which comprises the main bulk of the edictal mass, also presents no constructional problems. Some interesting points do, however, arise from the palingsensia of these texts.

The inscription of D.16.3.19 tells us that it is taken from Ulpian 17 ad edictum but Lenel places it in Paul 17 ad edictum.<sup>52</sup> The text reproduces an opinion of Julian and Marcellus to the effect that a filiusfamilias could bring an actio depositi. The problem of what actions a filius could bring in his own name is one which we know was considered by both Ulpian and Paul.<sup>53</sup> Ulpian 17 ad

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50. Lenel, Pal. 1, p.21.

51. Lenel, Pal. 1, p.765 n.1. See also, Greiner, Opera Neratii (Karlsruhe, 1973), p.11.

52. Pal. 1, p.994.

53. See, D.44.7.9 (Paul 9 ad Sab). Filius familias suo nomine nullam actionem habet, nisi iniuriarum et quod vi aut clam et depositi et commodati, ut Iulianus putat. And also, D.44.7.13 (Ulp. 1 disput.) In factum actiones etiam filii familiarum possunt exercere.

edictum, which has the generic heading de his quae  
cuiusque in bonis sunt, dealt, however, with communia de  
vindicatione et Publiciana actione, si ager vectigalis  
petatur, si praedium stipendiarum vel tributarium petatur,  
si usus fructus petatur and si servitus vindicetur.<sup>54</sup>

There is no obvious association between this commentary and D.16.3.19. On the other hand a statement to the effect that a filius familias could raise an actio depositi might plausibly appear in Paul 17 ad edictum which was entitled, de iudiciis omnibus.<sup>55</sup> If this is so, how is it that in D.16.3.19 the scribe wrote Ulpianus instead of Paulus? The reason probably lies in the fact that Paul ad edictum was being read concurrently with Ulpian ad edictum.<sup>56</sup> Having excerpted a passage from the work of one jurist the text might easily have been inscribed mistakenly with the name of the other.

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54. See Lenel, Pal. 2, p.514ff.

55. Lenel, Pal. 1, p.994.

56. See Honoré, Tribonian, p.269.

D.16.3.20 (Paul 18 ad edictum) states that where a deposit has been lost sine dolo malo it is not necessary for you to give security in case you should recover it at a later date because in that eventuality the actio depositi itself would lie. Lenel suggests that the text is taken from a part of the edict which had the rubric, in bonae fidei iudiciis quemadmodum praescribatur<sup>57</sup> and that it formed part of a discussion of the praescriptio, ea res agatur de cautione praestanda.<sup>58</sup> The decision in D.16.3.20 is best viewed as the end result of a procedural process. The depositor wishes to obtain security from the depositee for the purpose outlined in the text. He therefore brings an action on deposit inserting the above praescriptio in order to ensure that the issue of the security alone should be decided upon by the judge. Were this praescriptio not to be inserted in the formula the depositor's whole right of action on the deposit would be consumed. As it is, however, the claim for security is refused on the grounds that the actio depositi itself would lie if the property were subsequently recovered by the depositee.

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57. Pal. 1, p.997. But see also, Edictum Perpetuum p. xvii and p.155 where he expresses reservation as to the existence of such a rubric.

58. Pal. 1, p.997 n.4.

D.16.3.21 (Paul 60 ad edictum) is taken from the section of the edict, quemadmodum a bonorum emptore vel contra eum agere which deals with the actio Rutiliana.<sup>59</sup> The text says that, so long as the property is still in their possession, both the emancipated filius and the freed slave are liable to the actio depositi for deposits undertaken before their change in status. The case of the filius is assimilated by Lenel to that of a debtor who still retains a deposit after bonorum venditio.<sup>60</sup> In this case the action lies against the debtor and not against the bonorum emptor. In both these instances the formula would not in fact be Rutilian because the debtor or son is the person against whom the action is brought. However, these examples are exceptional due to the special consideration that the depositee was still in possession of the deposit when proceedings were raised. Ordinarily - that is, were the depositee not still in possession of the property - an action with a Rutilian formula would lie against the paterfamilias or bonorum emptor. The palingenesia of D.16.3.21 is therefore to be explained by

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59. Lenel, Pal. 1, p.1077.

60. Pal. 1, p.1077 n.2.



assuming that the passage appeared in the original work as an analogy with the case of the debtor who still held a deposit after bonorum venditio.<sup>61</sup>

The inscription of D.16.3.22 tells us that it comes from Marcellus 5 digestorum which deals with a number of topics but not with deposit. Lenel believes the inscription to be wrong.<sup>62</sup>

Firstly we should note that the text is sizeable and that Marcellus considers the quantum of the heir's liability to the actio depositi in great detail. This precludes the idea that the passage could have appeared in the original work as, for example, a parallel to a point raised in the

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61. But see Buckland, Textbook of Roman Law, p.686 who expresses doubts as to whether the formula was Rutilian in actions against a paterfamilias on a contract by a family subordinate. Lenel, Edictum Perpetuum, p.282, who represents the dominant view, believes that it was; but there is room for doubt. However, even if the formula was not Rutilian in such a case, it need not necessarily prejudice Lenel's argument with respect to the palingenesia of D.16.3.21. Whatever the precise nature of the formula might have been, the paterfamilias was liable de peculio on the contracts made by his family subordinates. The assimilation of the case of the filius and the debtor following bonorum venditio which is suggested by Lenel may simply have taken place on the basis that here were two cases of deposit where the person normally condemned on the contract was not.

62. Pal. 1, p.598 n.2.

discussion of one of the topics which are found there. Furthermore Marcellus's libri digestorum were arranged on conventional digesta lines and the first part, from which our text is taken, followed the edictal order. For this reason, were D.16.3.22 - in that it deals exclusively with deposit - to be placed in book 5, it would constitute an unprecedented deviation from the order of treatment. As a result Lenel places the text in Marcellus 6 digestorum which, according to the order of the edict, dealt firstly with depositum.

The final text from the edictal mass, D.16.3.23 (Modestinus 2 differentiarum) forms part of a larger fragment preserved in Collatio 10.2 from which we know that it was taken from a section of Modestinus's work entitled, de deposito et commodato.<sup>63</sup>

D.16.3.24-31 comprises the main bulk of the Papinian mass. There are no constructional problems as the texts appear in the order in which they were excerpted. Apart from D.16.3.29 (Paul 2 sententiarum) they are all excerpts from problematic literature and D.16.3.24,25,28 and 31 come from titles on depositum in their respective works. One point to note is that D.16.3.25pr. and 25.1 (Papinian 3 responsorum) did not stand next to each other in the original. Their position in the Digest is therefore the result of a compression of Papinian's work.<sup>64</sup>

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63. Lenel, Pal. 1, p.702.

64. Lenel, Pal. 1, p.892f.

According to Lenel, D.16.3.26 (Paul 4 responsorum) comes from a book with a title, si certum petetur.<sup>65</sup> He notes that in this passage Paul could not have been dealing specifically with deposit because the responsa, which were arranged on digesta lines, would have dealt with deposit in book 5 rather than in book 4.<sup>66</sup>

D.16.3.26pr. is a difficult text so it is helpful to begin with 26.1. In a recent study Gordon observes that 'the passage quoted in Greek...appears to be part only of a larger document recording an arrangement in which, as part of the bargain made between the parties, 10,000 has been left as 'a deposit' and the depositor has agreed to pay interest on the 10,000 until it has been returned'.<sup>67</sup> The question which Paul has to decide is whether interest can be claimed on the money. Paul's reply is contradictory because he says that the arrangement goes beyond the case of a deposit of money and therefore the

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65. Pal. 1, p.1227.

66. Pal. 1, p.1227 n.2.

67. Observations on depositum irregulare, Studi Biscardi 3, p.363ff.

interest can be claimed in an actio depositi. Because of the contradiction the et ideo...possunt clause has generally been regarded as an interpolation.<sup>68</sup> This idea is rejected by Gordon.<sup>69</sup> He argues that Paul firstly considered whether there was a stipulation here for the interest. Although the answer was in the negative, precisely because the possibility of a stipulation was considered, according to Gordon, explains the origin of the text in the rubric si certum petetur. Gordon then argues that Paul allowed a claim for interest in the actio depositi<sup>70</sup> and that the present state of the text is the result of cutting for the purpose of the Digest compilation.

The more common interpretation of the text - which founds itself upon the statement eum contractum de quo quaeritur depositae pecuniae excedere - is that for Paul this

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68. See Litewski, *Le Dépôt Irregulier II*, RIDA, 1975 p.279ff at p.299 and the literature which he cites at p.299 n. 240. There is also a grammatical irregularity because the clause depends on the verb respondit and yet it is not framed in the accusative plus infinitive; see Gordon, op.cit. p.13.

69. Op.cit., p.14ff.

70. 'At least on the basis of the officium of the judge who would take account of the agreement on interest as a matter of good faith'; op.cit., p.17

arrangement was a mutuum and not a deposit.<sup>71</sup> The actual capital sum would be reclaimed by the actio certae pecuniae creditae but because there had been no stipulation for interest it would not be repayable.<sup>72</sup> This interpretation also provides a plausible explanation for the origin of the text in the rubric si certum petetur.<sup>73</sup>

D.16.3.26.2 discusses the effect of a document which records the receipt by a certain Titius of ten units by weight of gold and two plates. Titius states that money is owed on this property (ex quibus debetis mihi decem) and Paul is asked to decide whether any obligation with respect to the money arises from the document. The fact that the text purports to come from the rubric si certum petetur would suggest that the document alleged that the money was due on a stipulation. It would be consistent with this hypothesis that Paul should decide that no obligation arises from the document itself.

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71. See Litewski, op.cit p.298ff. Contra, Klami, Mutua Magis Videtur Quam Deposita, (Helsinki, 1969) p.94f.

72. Longo, Il Deposito, (Milan, 1946), p.69f; Maschi, La Categoria Dei Contratti Reali (Milan, 1973), p.392f.

73. This is not the place to decide upon the respective merits of these approaches.

D.16.3.26pr. discusses the case of a closed box containing a number of objects which was entrusted (commendavit) to Gaia Seia by Publia Maevia before the latter set out on a journey. Publia Maevia requested (dixit) that should she fail to return, the property was to be given to her son by her first marriage. When she died intestate Gaia Seia asks whether the property should be returned to this son or to the woman's husband. Paul replies, to the son.

We are never given any idea what the basis of the husband's claim might be. However, in so far as all three texts in D.16.3.26 form a group, and the decisions in 26.1 and 26.2 turn on the nature of the agreements concluded between the parties, it is reasonable to assume that this was also the case in 26pr. The basis of the son's claim must therefore depend on the arrangement concluded between the two women. But, just how this arrangement forms the basis of the son's claim is quite another matter. The text is so elliptical that we are in fact unable to offer a solution to the problem which it presents. Therefore we shall merely survey the views which have been expressed and point out why they are unsatisfactory.

Glück draws attention to the description of the son as being of Publia Maevia's first marriage.<sup>74</sup> This, he suggests, must mean that there were other children from her second marriage who would have succeeded her ab intestato. That is to say, the son referred to in the text is not himself the heir. Glück then argues that the property is due to the son on a fideicommissum. To begin with, fideicommissa might be imposed upon any one taking under the will.<sup>75</sup> However, by the time of Gaius, they could be charged on the heir ab intestato,<sup>76</sup> and, by the

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74. Erläuterung der Pandecten 15, (Erlangen, 1868), p.220 n.87. On the question fideicommissum; also Simonius, Die Donatio Mortis Causa im klassischen römischen Recht (Basel, 1958), p.259f

75. Thomas, Textbook of Roman Law (1976), p.512.

76. Gaius, 2.270. Item, intestatus moriturus potest ab eo ad quem bona eius pertinent fideicommissum alicui relinquere, cum alioquin ab eo legari non possit.



time of Ulpian, upon the deposittee, who in this respect was treated as if he were the heir.<sup>77</sup> According to Glück, the arrangement between the two women must be construed as a fideicommissum on the basis of which Paul decides that the property should be returned to the son. The problem here is that there is no way to associate the son's claim with the condictio certae rei which would be the appropriate remedy in this case<sup>78</sup>, if Lenel is correct is placing the text under the rubric si certum petetur.

Pothier finds the rationale for the decision in 26pr. by arguing from an opinion of Tryphoninus in D.16.3.31.1.<sup>79</sup> The latter text deals with the question of to whom a deposit should be returned where there are competing claims. The particular case in point is that of a deposit made by a thief. Should the property be returned to the thief or to the owner? Tryphoninus states that general

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77. D.30.77 (Ulp. 5 disput.) Si pecunia fuit deposita apud aliquem eiusque fidei commissum, et eam pecuniam praestet, fideicommissum ex rescripto divi Pii debetur, quasi videatur heres rogatus remittere id debitori: nam si conveniatur debitor ab herede doli exceptione uti potest: quae res utile fideicommissum facit. Quod cum ita se habet, ab omni debitore fideicommissum relinqui potest.

78. See, Lenel, E.P., p.232.

79. Pandectes de Justinien 6 (Paris, 1821), p.311ff.

equitable considerations should be applied and the property returned to its owner. Only if the owner does not move to recover his property should it be returned to the thief. Therefore, argues Pothier, in a case where there was doubt over whether the property deposited with me was stolen, I had to return it to the depositor or to the person named by him, and not to the party whose only claim was that he was owner. The facts in 26pr. Pothier sees as similar.<sup>80</sup> Publia Maevia's husband, he believes, claimed that he was the owner of the deposit.<sup>81</sup> The son is named by Publia Maevia as the person to whom the deposit is to be returned. Pothier is not entirely clear but the implication is that the son's remedy is the actio depositi,<sup>82</sup> presumably because he is heir. Yet, at this point, we run into the same difficulties as we encountered earlier; there is no way to associate such an analysis with the rubric si certum petetur.

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80. It is not clear whether, according to Pothier's analysis, the husband thinks that the property had been stolen from him.

81. Op. cit., p. 313 n.1.

82. Because, referring back to the example of the thief and the owner, the basis of the thief's claim was that he was the depositor.

This is also the case with respect to Rotondi's analysis of the text.<sup>83</sup> He associates 26pr. with C.3,42,8<sup>84</sup> and argues that where a depositor, as a condition of the contract, has instructed that the property be returned to a third party, this person can bring an actio (depositi) utilis.

D.16.3.27 (Paul 7 responsorum) discusses a case where a father supplied dos for his daughter in her marriage to a slave who later died. The problem is that the dowry was given sub titulo depositi, the father himself has died and his daughter is the heir. Paul is asked to decide by what

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83. Scritti, 2, (Milan, 1922), p.75.

84. C.3,42,8. Si res tuas commodavit aut deposuit is, cuius precibus meministi, adversus tenentem ad exhibendum vel vindicatione uti potes. I. Quod si pactus sit, ut tibi restituantur, si quidem ei qui deposuit successisti, iure hereditario depositi actione uti non prohiberis: si vero nec civili nec honorario iure ad te hereditas eius pertinet, intellegis nullam te ex eius pacto contra quem supplicas actionem stricto iure habere: utilis autem tibi propter aequitatis rationem dabitur depositi actio. A further objection to Rotondi's analysis is that the actio utilis appears to be given only to the owner of property which had been deposited by someone else on the undertaking that it be returned to the owner.

action the daughter can recover the so-called dos, hence the origin of the text in a book de re uxoriae<sup>85</sup> is quite straightforward.

Finally with regard to this section from the Papinian mass, D.16.3.30 (Neratius I responsorum) is a text about which we can come to no definite conclusion. The responsa is a collection of quotations of Neratius made up from the works of other jurists<sup>86</sup> but because the compilers took so few excerpts from it, it is impossible to determine how it was arranged.<sup>87</sup>

Another text about which we can come to no definite conclusion is D.16.3.32 (Celsus 11 digestorum). It is taken from a book, de tutelis<sup>88</sup>, and has been included in the Digest title on depositum because it contain Celsus's approval of Nerva's statement, latiorem culpam dolum esse.

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85. Lenel, Pal. 1 p.1232. See also, Buckland, The Roman Law of Slavery (Cambridge, 1908), p.211

86. See Greiner, Opera Neratii (Karlsruhe, 1973), p.159f.

87. Schulz, Roman Legal Science (Oxford, 1946)), p.228.

88. Lenel, Pal. 1, p.142.

Honoré believes that the text is a coda of two or more masses but not of the whole title.<sup>89</sup> His reason for treating it as such is that the text is from the edictal mass and yet appears in D.16.3 at the end of the Papinian mass, which means that it was discarded when either the edictal and Papinian masses were being edited together or possibly even when the Sabinian, edictal and Papinian masses were being edited as a whole. It is not a coda of the whole title because it would then appear after the appendix.<sup>90</sup> While this may be the most likely explanation for the present position of the text there are other possibilities.<sup>91</sup> The text might be extraneous or, conceivably, a transposition.<sup>92</sup>

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89. The Editing of the Digest Titles, ZSS 90 (1973) p.262ff at p.290

90. For a discussion of the different types of coda, see Honoré, op.cit., p.66ff.

91. We cannot be certain that D.16.3.32 is a coda simply because it is a single text. Only if D.16.3.32 appeared with other texts which had been discarded from the main body of the title yet which nevertheless preserved their order inter se could we be certain on this point; see Honoré, op.cit., p.265ff.

92. For a clarification of these terms, see Honoré, op.cit., p.268ff.

D.16.3.32 was originally concerned with the responsibility of the tutor and has been re-written in terms of deposit by the compilers.<sup>93</sup> To be able to determine whether this text was a coda or extraneous we would have to know with what degree of foreplanning the compilers approached the title on depositum. For example, is it likely that at the excerpting stage they took a text dealing with the standards required of a tutor with a view to its alteration and inclusion in D.16.3? Alternatively is it more likely that this text was rejected from the title for which it had originally been excerpted and therefore only later became available to the editors of the title on deposit?

If the content of D.16.3.32 was an innovation of the compilers with respect to depositum, it is certainly possible that this was the result of a deliberate policy on their part, which would suggest that the text is a coda and not extraneous. Furthermore, as D.16.3.32 appears before the appendix, the inference may be drawn that, were it extraneous, it was included in the title at the first editorial draft and therefore that it was originally rejected from a title which was edited before D.16.3. And

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93. See Lenel, Pal. 1 p.142 n.2 who associates the text with D.27.3 lpr. (Ulp. 36 ed). Also, Longo, Il Deposito (Milan, 1946), p.23ff.

yet there is no obvious title before D.16.3 in which what is now D.16.3.32 would have formed a part.<sup>94</sup> This would be further evidence in favour of the fact that the text is a coda.

But there is another possibility. Were D.16.3.32 in fact excerpted for the title on depositum, before the editing process it stood between D.16.3.21 and 22. These two texts, along with those in the main bodies of the edictal and Papinian masses deal with specific practical questions. On the other hand in D.16.3.31 Tryphoninus conducts a more general discussion of the effects of bona fides on the contract. Because D.16.3.32 makes a general statement on the standard of care required of the depositee, for this reason it may have been transposed to stand with D.16.3.31. Also it is possible that the editors of D.16.3, when working on the three main masses jointly, saw the best placing of an innovatory text like D.16.3.32 as being at the end of the group.

The last two texts of the title are from works from the appendix. D.16.3.33 (Labeo 6 posteriorum a Iavoleno epit.) comes from a title, de deposito, while D.16.3.34 (Labeo 2

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94. Though this, of course, cannot be asserted unequivocally.

pithanon) is from a section of that work, de furtis.<sup>95</sup>

The text discusses the refusal by the deposittee to give back the deposit unless money is paid.<sup>96</sup> A refusal by the deposittee to return might amount to theft. The fact that only the actio depositi is mentioned here should not occasion surprise as this action lay in addition to the actio furti in cases of theft by the deposittee.<sup>97</sup>

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95. Lenel, Pal. 1, p.531

96. See Thomas, Infitiando depositum nemo facit furtum, Studi Volterra 2, p.759ff.

97. Cf. D.16.3.29pr.



CHAPTER III

THE ACTION OF THE XII TABLES 'EX CAUSA DEPOSITI'

## THE ACTION OF THE XII TABLES 'EX CAUSA DEPOSITI'

Coll. 10, 7, 11 = P.S. 2, 12, 11. Ex causa depositi lege duodecim tabularum in duplum actio datur, edicto praetoris in simplum

This text, which contains a statement found in the Collatio originally taken from the Sententiae of Paul, has given rise to a wide variety of views on the nature of the action on deposit given by the XII Tables. Because the text is the only direct evidence we have for the existence of such a remedy, firstly we must determine how much it tells us about the action, and then, on that basis, we can consider the various theories which have sought to identify its character. Any evidence given by Paul's text creates a presumption in the light of which these theories have to be assessed.

The text basically tells us three things about the action: (1) the condemnation was in duplum, (2) it was established by the XII Tables and (3) it lay ex causa depositi.

The only difficulty here relates to the meaning to be given to the phrase ex causa depositi. Yet we are helped in this respect by the fact that the phrase qualifies both the action of the XII Tables and the praetorian action. The latter was an independent action on deposit (actio depositi); therefore the inference must be that this was also the case with regard to the action of the XII Tables. Possibly we can go one step further and make an additional inference concerning the scope of the XII Tables action.

The praetorian actio depositi in simplum concerned cases of ordinary deposit. By this we mean that it covered all cases of depositing excluding the so-called necessary cases covered by the praetorian action in duplum<sup>1</sup>. But the distinction between ordinary and necessary deposit was first made by the praetor<sup>2</sup>, so it did not exist at the time of the XII Tables. Paul in the above mentioned text makes no suggestion that the scope of the two actions to which he refers was different; therefore we should assume that it was the same. Since necessary deposit as such was not known in early law<sup>3</sup> the implication is that the action of the XII Tables covered all cases of depositing without distinction between those which later became known as ordinary and necessary.

Finally, we must state the likelihood that the action of the XII Tables lay in circumstances where the depositor had failed to return the property entrusted with him. In circumstances where property has been handed over from

1. The necessary deposits are those made tumultus incendii ruinae naufragii causa. Cf D.16.3.1.1 (Ulp. 30 ed.) Quod neque tumultus neque incendii neque ruinae neque naufragii causa depositum sit, in simplum, earum autem rerum, quae supra comprehensae sunt, in ipsum in duplum.....
2. D. 16.3.1.2 (Ulp. 30 ed.) Merito has causas deponendi separavit praetor, quae continent fortuitam causam depositionis ex necessitate descendentem, non ex voluntate proficiscentem.
3. Except there are scholars who argue that the action of the XII Tables dealt only with cases of necessary deposit; see post.

one person to another to be returned on demand, the law will first sanction the failure to return the property.

The Theories on the Nature of the Action of the XII Tables.

A theory attributed to Gotofredus by Rotondi<sup>4</sup> and Gandolfi<sup>5</sup> is that the action of the XII Tables was a special action on deposit of a "contractual" nature. It is not entirely clear on the basis of what the Italian scholars say what Gotofredus would have meant by the term "contractual". However, following Gandolfi, the point may be this: that Gotofredus believed that civil law obligations arose from the transaction of depositing itself<sup>6</sup>, to be distinguished from the case where the XII Tables penalised as a wrong the mere fact of a failure to return the property which had been deposited. This hypothesis has found no followers. Deposit was recognised by the civil law only

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4. Scritti 2 (Milan, 1922), p.17.

5. Il Deposito (Milan, 1976), p.47.

6. As is suggested by the reconstruction offered by Gotofredus of the XII Tables provision: Si quid endo deposito dolo malo factum escit duplione luito, see Gandolfi, op. cit., p. 47. This hypothesis has to be distinguished from the idea of Ambrosino, La legis actio sacramento in personam e la protezione giuridica dei rapporti fiduciari, Studi Arangio Ruiz 2, p. 251ff that a deposit effected by means of mancipatio with a pactum fiduciae gave rise to contractual obligations (diritto di credito). In this case, argues Ambrosino, the obligation arose from the nuncupatio, not actually from the deposit. Contra, Maschi, La Categoria dei Contratti Reali (Milan, 1973), p. 134ff.

on the introduction, circa the time of Gaius, of an action in ius concepta which was preceded by a praetorian action in factum.<sup>7</sup> This development would be very odd had depositum given rise to civil law obligations in the XII Tables. Also, it would be difficult to explain why, in the Institutes of Gaius, depositum was not presented as a source of obligations re.<sup>8</sup> In fact, the condemnation in duplum suggests that the XII Tables penalised the failure to return deposited property as a wrong, and it is on this basis that the remaining theories to be considered proceed.

Voigt<sup>9</sup> has argued that the in duplum actio ex causa depositi referred to by Paul was the actio fiduciae which, because it was dependent on a manicpatio, at the time of the XII Tables contained a condemnation in duplum.<sup>10</sup>

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7. Contra, Karlowa, Römische Rechtsgeschichte 2 (Leipzig, 1901), p. 601ff. A full discussion of this question is found in a later section. See also Longo, Il Deposito (Milan, 1946) p.3f who observes that if depositum had given rise to obligations in the XII Tables, why did the praetor need to introduce an action in factum in the late republic.

8. Gaius, 3.90-91.

9. Ius Naturale 2, (Leipzig, 1858) p.541f. Der XII Tafeln 2, (Leipzig, 1883) p.479ff. See also, Paoli. Lis Infitiando Crescit in Duplum (Paris, 1933), p.170ff.

10. Like the actio auctoritatis and actio de modo agri. Paoli, op. cit., p.171 explains the condemnation in duplum by reference to the rule of the XII Tables mentioned by Cicero, De Officiis 3,16,65: quae essent lingua nuncupata quae qui infitiatus esset, dupli poenam subiret... That is, in Paoli's opinion the condemnation in duplum was a consequence of infitiatio in relation to the pactum fiduciae contained in the mancipatio.

His arguments in support of this thesis are as follows: firstly, on the basis of Gaius 2.60,<sup>11</sup> he observes that deposits were made by means of fiducia cum amico; secondly, that there is no suggestion that a civil law actio depositi existed in early law, which is confirmed by the absence of an actio depositi in the list of infaming actions given in the Lex Iulia Municipalis;<sup>12</sup> and thirdly he notes that Paul does not speak of an actio depositi as such, but of an actio ex causa depositi, which, Voigt argues, shows that the remedy was not an independent action on deposit but one based on fiducia where this had been used to effect a deposit.<sup>13</sup>

This thesis has found few followers.<sup>14</sup> It has been objected

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11. Gaius 2.60. Sed cum fiducia contrahitur aut cum creditore pignoris iure aut cum amico, quo tutius nostrae res apud eum essent .....
  12. For a full discussion of this problem, see post.
  13. Gandolfi, op. cit. p. 49f. observes that if Paul were referring to an actio fiduciae he would have said that the action arose, not causa depositi, but from the mancipatio. Cf. also, Rotondi, Scritti 2, p.15.
  14. For the early literature see the list given by Erbe, Fiduzia im Römischen Recht (Weimar, 1940) p. 6 n.5. Also, Longo, La Fiducia (Milan, 1933) p.19ff, Kaser, Das altrömische Ius (Göttingen, 1949) p.219 n.39. Burillo, Las formulas de la actio depositi, SDHI (1962), p.233ff at p.238f; Watson, The Law of Obligations in the later Roman Republic (Oxford, 1965) p.157; Wlassak, Rechtshistorische Abhandlungen (Wien, 1965), p.100ff at p.114f; Maschi, op. cit., p.127ff; Gandolfi, op. cit., p.49f; Litewski, Studien zum sogenannten depositum necessarium, SDHI 43 (1977) p.188ff at p.193.

that the actio fiduciae did not go back to the XII Tables,<sup>15</sup> that it never contained a condemnation in duplum,<sup>16</sup> and that in actions dependent upon a mancipatio such as the actio auctoritatis and actio de modo agri it was the transferor and not the transferee who was subjected to the double condemnation.<sup>17</sup> The most important objections relate, however, to the sort of property which could be the object of a deposit made by means of fiducia and to the formalities which would attend the transaction in such circumstances. Both these objections stem from the fact that fiducia was not an independent transaction but an agreement subsidiary to a conveyance by mancipatio. This means firstly that only res Mancipi could have been the object of a legally protected deposit at the time of the XII Tables. Yet, it seems likely that commonly it would have been res nec Mancipi such as valuables which would have been entrusted for safekeeping. In addition, Niemeyer<sup>18</sup> has pointed out that most deposits tend to be for a short period of time without a consciousness of the parties that they are entering into a legal transaction. However, where mancipatio is used, not only are there formalities

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15. Niemeyer, Fiducia cum amico und depositum, ZSS 12 (1892), p.297ff at p.321; Maschi, op. cit., p.127ff.

16. Niemeyer, op. cit., p. 321; Burillo, op. cit., p.238.

17. Rotondi, Scritti 2, p.14; Gandolfi, op.cit., p.49.

18. Op. cit., p.313.



to be gone through in front of witnesses, but ownership is also transferred from one party to the other. Therefore, while a deposit could no doubt be effected by fiducia cum amico, it seems unlikely that the action of the XII Tables ex causa depositi was restricted to such a transaction.

Ubbelohde<sup>19</sup> believes that the action in duplum of the XII Tables was an actio perfidiae which lay in circumstances of wrongful appropriation in all transactions where property had been given into the possession or detention of another by the owner. The dolus of the receiver in these cases was regarded, not as theft, but as an infraction of fides.

The basis for this thesis Ubbelohde finds in D.26.7.55.1 (Tryphoninus 4 disputationum). When referring to the actio rationibus distrahendis, Tryphoninus states:  
sed tutores propter admissam administrationem non tam invito domino contrectare eam videntur quam perfide agere.

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19. Zur Geschichte der benannten Realcontracte auf Rückgabe derselben Species (Marburg/Leipzig, 1870) p.38ff. This work was unavailable to me. Contra, Pernice, Labeo, 1 p. 424. Niemeyer, op. cit., p.320f. Taubenschlag, Zur Geschichte des Hinterlegungsvertrages im römischen Recht, Grünhut's Zeitschrift 35 (1908) p.683ff at p.686; Rotondi, Scritti 2, p.16; Burillo, op. cit., p.239; Gandolfi, op. cit., p.51.



Neimeyer<sup>20</sup> observes that the reason stated by Tryphoninus why the tutor cannot be guilty of theft is propter admissam administrationem. The deposittee had no such power of administration, and, indeed, we know that certainly as early as Quintus Mucius use by him of the entrusted property in fact did constitute theft.<sup>21</sup> Therefore, one cannot argue from the case of the tutor to that of the deposittee in this context. Also a fundamental objection against Ubbelohde's thesis is that there is no evidence that a general actio perfidiae of the sort he envisages ever existed.<sup>22</sup>

The idea that the action of the XII Tables ex causa depositi was none other than the actio furti nec manifesti was first suggested by Jhering<sup>23</sup> who is followed by Leonard,<sup>24</sup>

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20. Op. cit., p. 320.

21. Aulus Gellius, Noct. Att. 6,15,2. Itaque Q. Scaevola in librorum quos de iure civili composuit verba haec posuit: quod cui servandum datum est si id usus est, sive quod utendum accepit ad aliam rem atque accepit usus est, furti se obligavit.

22. See especially Taubenschlag, op. cit., p.686 and Burillo, op. cit. p.239.

23. Das Schuldmoment im römischen Privatrecht, in Vermischte Schriften jurist. Inhalts (Leipzig, 1879), p. 190. This work was available to me only in translation; De la faute en droit prive, Études Complémentaires de l'Esprit du Droit Romain (Paris, 1880), p.3ff at p.37.

24. Depositum, P.W.R.E. 5,1, col. 235.

Arangio-Ruiz,<sup>25</sup> Burillo,<sup>26</sup> and Gandolfi.<sup>27</sup> They believe that this action lay against the depositum who fraudulently failed to return a deposit.

The evidence for this is firstly that the actio furti nec manifesti lay in duplum. More importantly, however, the dishonest depositum was liable for theft in later law. For republican<sup>28</sup> and classical times<sup>29</sup> the liability in theft of the depositum who uses the object entrusted to him without permission is well documented. But, in addition, Thomas<sup>30</sup> has convincingly shown that the fraudulent refusal by the depositum to return a deposit constituted furtum. The question, therefore, concerns how early this liability for refusal can be dated.

Support for the view that it went back to the XII Tables can be drawn from the absence of an actio depositi in

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25. Le formule con demonstratio e la loro origine, Rariora p.55f; Istituzioni<sup>14</sup>, p.309.

26. Op. cit. p.239f.

27. Op. cit., p.59ff.

28. Aulus Gellius. Noct. Att. 6,15,2.

29. Gaius, 3.196. Itaque, si quis re quae apud eum deposita sit utatur, furtum committit.

30. Infitiando depositum nemo facit furtum, Studi Volterra 2, p.759ff. Cf, Burillo, op. cit., p.240.

the list of infaming actions given in the Tabula Heracleensis.<sup>31</sup> Arguably this would be odd if the XII Tables had established an independent action on deposit.<sup>32</sup> However, an objection to the hypothesis that liability in the actio furti for refusal to return the object deposited originated in the XII Tables is that at that time asportation was an essential requirement of theft.<sup>33</sup> In the case of deposit there need not have been a carrying away. Indeed, the depositee in fact holds the property by request of the person from whom he is alleged to have stolen it. One might argue that although the necessity of asportation means that normally there can have been no theft unless the object was removed, a special exception in the case of deposit may have been made by the XII Tables. However, the statement from Paul's Sentences clearly speaks of a special deposit action, therefore this thesis, even although it has its attractions, is best rejected.

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31. See Burillo, op. cit., p.239.

32. A full discussion of this problem appears in a later chapter.

33. Kaser, Das altrömisches Ius, p.219 n.39 and the literature he cites. Also, Watson, op. cit., p.157; Litewski, review of Gandolfi, Il Deposito, in BIDR 79 (1976), p.279 and Maschi, op. cit., p.134 and the literature he cites. But cf Birks, A note on the development of furtum, Irish Jurist 8 (1973), p.349ff who argues that the assumption that furtum originally required asportation is likely to be wrong.

The most widely held view is that the XII Tables established a special action for deposit. However, within this group there are differences of opinion on the precise scope of the action. Some scholars believe it was restricted to cases of deposit made tumultus incendiarii ruinae naufragii causa,<sup>34</sup> others argue that it covered all cases of deposit. We begin by looking at the arguments advanced by those who take the former view.

The first argument in support of the theory is drawn from the formulation of the edict.

D.16.3.1.1 (Ulp. 30 ed.). Praetor ait: quod neque tumultus neque incendiarii ruinae neque naufragii causa depositum sit, in simplum, earum autem rerum, quae supra comprehensae sunt, in ipsum in duplum.....iudicium dabo.

We can reasonably assume that necessary deposits (i.e. those made tumultus ..... causa) were a relatively rare occurrence. Yet it is this subordinate form of depositing which is mentioned first in the edict. As is shown by the negative formulation, quod neque tumultus ..... causa depositum sit, it is treated as the rule to which ordinary deposit is the exception. The reason for this formulation,

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34. In particular, Niemeyer, op. cit., p.297ff at p.317ff Asher, Ueber die Depositumsklagen des classischen römischen Rechts, in Zeitschrift für Zivilrecht und Process, N.F. 22 (1865) p.266ff at p.267f and Maschi, op. cit., p.131ff.

argues Asher,<sup>35</sup> is to be found in the history of depositum. The action of the XII Tables, he believes, covered only cases of necessary deposit. Therefore, when the praetor introduced the edict on depositum, in Asher's opinion, it simply remained for him to add his own provisions on ordinary deposit. In doing this - given the existence and character of the action of the XII Tables - he naturally identified ordinary deposit in the negative fashion which we find; viz, as deposit which was not necessary.

The second argument that the action of the XII Tables concerned only cases of necessary deposit is drawn from the fact that the action in duplum of the edict was a perpetual action.<sup>36</sup> Praetorian actions were generally annual and civil law actions perpetual<sup>37</sup>, which means, it is alleged, that the edictal action for necessary deposit must have had a civil law origin in the XII Tables.<sup>38</sup>

The third argument is that when Paul made his observation on the action of the XII Tables in P.S. 2,12,11, he must have had the edict in mind. In his own time there was

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35. Op. cit., p.267.

36. D.16.3.18 (Neratius 2 membr.) See post.

37. Gaius 4.110. Quo loco admonendi sumus eas quidem actiones quae ex lege senatusve consultis proficiscuntur perpetuo solere praetorem accomodare, eas vero quae ex propria ipsius iurisdictione pendent plerumque intra annum dare.

38. Asher, op.cit., p.268; Niemeyer, op. cit., p.323.

only one action in duplum ex causa depositi, namely the one for necessary deposit mentioned in the edict, and the actio in duplum, Paul says, lege duodecim tabularum datur. Therefore, this text from P.S. is taken as a statement of the law in force when that work was written and not just as an historical reference to a rule established by the XII Tables.<sup>39</sup>

Fourthly, reference is made to a further extract from P.S. from which it is argued that the emergency cases were regarded as the paradigm cases of depositing.<sup>40</sup>

Coll. 10,7.3.= P.S. 2,12,3. Deponere videtur, qui in metu ruinae incendii naufragii apud alium custodiae causa deponit.

The fifth argument relates to the fact that the essential contrast between the actions for necessary and ordinary deposit is in their quantum. Neimeyer,<sup>41</sup> following Jhering,<sup>42</sup> believes that had the XII Tables dealt with ordinary deposit the praetor certainly would not have

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39. Niemeyer, op. cit., p.323; see also Asher, op.cit., p.267f.

40. Niemeyer, op. cit., p.322.

41. Op. cit., p.318f.

42. Op. cit., p.37.

favoured the dishonest deposittee by altering the penalty which this statute gave against him. Therefore, on the assumption that the actio in duplum of the XII Tables was a special action on deposit, he concludes that the scope of this action and that given by the praetor for ordinary deposit was different. This must mean that the XII Tables dealt only with necessary deposit.<sup>43</sup>

The sixth argument is advanced by Maschi<sup>44</sup> on the basis of D.16.3.1.4 (Ulp. 30 ed.).

D.16.3.1.4 (Ulp. 30 ed.) Haec autem separatio causarum iustam rationem habet. Quippe cum quis fidem elegit nec depositum redditur, contentus esse debet simplo, cum vero extante necessitate deponat, crescit perfidiae crimen et publica utilitas coercenda est vindicandae rei publicae causa: est enim inutile in causis huiusmodi fidem frangere.

He asks, why does the text in the context of necessary deposit speak of crimen and not of delictum? The answer given in the text is that in cases of necessary deposit a failure to return the property represents such a degree of perfidia as to damage the public welfare. This conception

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43. See also, Maschi, op. cit., p.132 who draws attention to Ulpian's statement in D.16.3.1.2, merito has causas deponendi separavit praetor; i.e. the distinction between the two types of depositing was first made by the praetor. So, on the assumption that had the XII Tables dealt with ordinary deposit the praetor would not have reduced the double penalty, the conclusion must be that the XII Tables dealt only with necessary deposit.

44. Op. cit., p. 132f.



of necessary deposit as a crimen, Maschi believes, is likely to have originated in the XII Tables. He does not develop the point but Maschi seems to be suggesting that a conception of necessary deposit as a public wrong could only have arisen if it had first been sanctioned by the XII Tables.

We now consider the above points in turn. As a preliminary observation it must be said that it is a quite plausible idea that the action of the XII Tables dealt only with necessary deposit. Such an hypothesis, for example, offers a possible explanation for the present formulation of the edict and for the perpetual nature of the edictal action in duplum. Our purpose now is to examine the facts to which the above arguments relate, not so much to prove this theory wrong, but rather to determine whether the facts might equally bear the different interpretation that the action of the XII Tables dealt with ordinary deposit.<sup>45</sup>

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45. Given the fact that the distinction between ordinary and necessary deposit was first made by the praetor (cf, D.16.3.1.2), according to the scholars who hold this view, the action of the XII Tables covered all cases of deposit, including those which later came to be known as necessary deposit.



This is the opinion of, inter alia, Pernice,<sup>46</sup>  
Taubenschlag,<sup>47</sup> Rotondi,<sup>48</sup> Longo,<sup>49</sup> Kaser,<sup>50</sup>  
Watson,<sup>51</sup> Wlassak,<sup>52</sup> Sondel<sup>53</sup> and Litewski.<sup>54</sup>

(1) The negative formulation of the edict.

Differences of opinion exist over the inference to be drawn from the formulation quod neque tumultus ..... causa depositum sit with respect to which type of deposit, ordinary or necessary, was the dominant one in the mind of the praetor. Asher,<sup>55</sup> for example, states that the formulation shows that necessary deposit was the rule and ordinary deposit the exception. Longo,<sup>56</sup> on the other hand, believes the contrary. The contrast in views derives from the differing emphasis each gives to parts of the edictal clause. Asher focuses simply on the description of ordinary deposit as what

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46. Labeo 1, p.435.

47. Grünhuts Zeitschrift 35 (1908) p.691ff at p.694ff

48. Scritti 2, p.14ff.

49. Il Deposito, p.3 and p.53ff.

50. Das altrömische Ius, p.143, 218 and 219 n. 39, R.P.R. I. (Munich, 1955), p.446

51. Obligations, p.157f.

52. Rechtshistorische Abhandlungen, p.111.

53. Szczegolne Rodzaje Depozytu w prawie Rzymskim (Krakow, 1967) which was unavailable to me. See, however, the review of this book by Litewski, in Labeo 20 (1974), p. 405ff.

54. SDHI 43 (1977), p.188ff at p.194.

55. Op. cit., p. 267.

56. Op. cit., p.57.

necessary deposit is not, and Longo, who takes the edictal clause as a whole, on the fact that the remedy for ordinary deposit is mentioned first.

Similar differences of opinion exist amongst the group of scholars who believe that the action of the XII Tables dealt only with ordinary deposit. The approach amongst this group which is closest to Asher's is that of Rotondi.<sup>57</sup> He argues that in the edict the praetor restricted the application of the action of the XII Tables to the emergency cases and introduced a new action for ordinary deposit. Precisely because, in his opinion, the new praetorian action in duplum derived from the old law in this way, necessary deposit was treated as the standard case in the edict and ordinary deposit as the exception, i.e. as deposit which was not necessary. Therefore Rotondi, like Asher, traces the negative formulation of the edict to the influence of the XII Tables.

Longo<sup>58</sup> rejects this idea because he sees no connection between the action of the XII Tables and the praetorian

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57. Scritti 2, p.24ff. See also Pernice, ZSS 9 (1888) p.229 n.1; Lenel, E.P. p.290 n.7; Burillo, op. cit., p.246 who regards Rotondi's as a probable explanation and Watson, op. cit., p.160.

58. Op. cit., p.56f; also Litewski, SDHI 43 (1977), p.193.

action for necessary deposit. He points first of all to the fact that the praetor presents himself as the creator both of the action for necessary deposit and ordinary deposit. He then adds that had the praetor simply wished to preserve the old civil law action for the emergency cases, he would, when propounding the edict, only have said: quod neque tumultus ..... causa depositum sit, in simplum iudicium dabo. He would not have needed to promise an action in duplum for those cases which remained sanctioned by the civil law. The formulation of the present edictal clause, Longo believes, in fact results from the fusion of two much older edicts which dealt separately with ordinary and necessary deposit. When convenience demanded that these be amalgamated it was natural that the principal edict on ordinary deposit absorbed, in the form of an exception, the subordinate necessary deposit.<sup>59</sup>

Either of these theories might conceivably explain the praetor's motives for describing ordinary deposit as he does. The problem, however, was possibly more straightforward. Where there is a single institution which contains two elements, one narrow and one broad, how does one describe the element which is broad? A succinct way

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59. See also, Litewski, Depositary's Liability in Roman Law, A.G. (1976), p.5f (as in offprint) and the literature he cites.

of doing this where both elements stand together in a single clause is to define the narrow element and state that all other cases of the institution not contained in this definition constitute the broad element. This is precisely what has happened in the edict on depositum. A similar example of the practice is found in the Institutes of Gaius. Gaius defines manifest theft (3.184) and continues:

3.185. Nec manifestum furtum quid sit, ex iis quae diximus intellegitur. Nam quod manifestum non est, id nec manifestum est.

The description of the broad non-manifest theft is achieved by identifying it as what is not manifest theft.

According to this explanation of the formulation of the edict on deposit it is irrelevant whether the text preserved in D.16.3.1.1 is an amalgam of a number of edicts or not. The same problem of definition presents itself in either case. Also, as regards the question of which type of deposit was the dominant in the mind of the praetor, on the basis of this explanation it was clearly ordinary deposit. It appears first in the edict (actio in simplum) and the negative formulation is simply the means by which it is described.<sup>60</sup>

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60. In essence this is the position held by Longo. Of course the formulation need not necessarily be associated with the "amalgam" theory. Cf, Burillo, op. cit., p.246.

As an argument either that the action of the XII Tables dealt only with necessary deposit, or that it dealt with all deposits and was restricted by the praetor to the necessary cases, the negative formulation of the edict is indecisive. All that can be said is that it is not inconsistent with either of these approaches. But the essential point in this discussion is to identify the reason for the negative formulation. As argued by scholars such as Asher and Rotondi, this may have been due to peculiarities in the historical development of depositum. However, the more obvious reason for the special formulation was the problem of definition as we have described it.

The perpetual nature of the praetorian action in duplum for necessary deposit.

The praetorian action in duplum for necessary deposit was perpetual. This is shown by D.16.3.18 (Nerat. 2 membr.).

D.16.3.18 (Nerat. 2 membr.). De eo quod tumultus incendii ruinae naufragii causa depositum est, in heredem de dolo mortui actio est pro hereditaria portione et in simplum et intra annum quoque: in ipsum et in solidum et in duplum et in perpetuum datur.

Gaius states the general proposition that praetorian actions were annual but civil law actions perpetual.

Gaius, 4.110. Quo loco admonendi sumus eas quidem actiones quae ex lege senatusve consultis proficiscuntur perpetuo solere praetorem accomodare, eas vero quae ex propria ipsius iurisdictione pendent plerumque intra annum dare.

Therefore, because it is perpetual, the conclusion is drawn that the action in duplum for necessary deposit was the self same action of the XII Tables. There are, however, further possible explanations for the perpetual nature of the action.

Again Rotondi<sup>61</sup> is closest to the scholars who think that the XII Tables dealt only with necessary deposit because he also explains the perpetual characteristic on the basis of the influence of this statute. In the above-mentioned text from the Institutes of Gaius we should note that praetorian actions were only usually (plerumque) annual.

Gaius continues:

Gaius, 4.111. Aliquando tamen et perpetuo eas dat, scilicet cum imitatur ius legitimum: quales sunt eae quas bonorum possessoribus ceterisque qui heredis loco sunt accomodat. Furti quoque manifesti actio, quamvis ex ipsius praetoris iurisdictione proficiscatur, perpetuo datur; et merito, cum pro capitali poena pecuniaria constituta sit.

Rotondi, as we know, believed that the action of the XII Tables dealt with all cases of depositing and that the praetor simply limited this action to cases of necessary deposit. Therefore, in his opinion, the praetorian action in duplum is one where imitatur ius civile.<sup>62</sup> Although

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61. Scritti 2, p.49.

62. Cf, Taubenschlag, op.cit., p.710ff who believes that the action for necessary deposit was actually a civil law action because it was the general action of the XII Tables restricted to the necessary cases.

this is a praetorian action, in effect it is simply a restricted application of the civil law action of the XII Tables. So, just as the praetorian actio furti manifesti is perpetual because it goes back to the XII Tables, so is this praetorian action for necessary deposit.

Alternatively, the view held by those scholars who believe that the action in duplum for necessary deposit had a purely praetorian origin is that the perpetuity was the result of a desire to furnish the depositor a special protection in the emergency cases.<sup>63</sup> These arguments show that there is no necessary reason to explain the perpetuity of the action on the basis that it originated in the XII Tables where it only lay tumultus ..... causa.<sup>64</sup>

P.S. 2,12,11 contains a statement of the law in force when the work was written.

Here again we have an argument which cannot positively be disproved. However, it is equally possible that the reference to the action of the XII Tables was of an historical nature.<sup>65</sup> Support for the latter approach is

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63. Litewski, SDHI 43 (1977), p.197 n.37, who follows Amelotti, La Prescrizione delle Azioni in Diritto Romano (Milan, 1958), p.42.

64. A full discussion of this question follows.

65. Litewski, A.G. 1976, p.6 n.12 (as in offprint); Id., SDHI 43(1977), p.196 n.32.



supplied by Levy.<sup>66</sup> He argues that while the author of Paul's Sentences knew the causae deponendi associated with necessary depositing he did not recognise necessary deposit in the sense of allowing an action in duplum in these cases. If this is correct the author in P.S. cannot have been making a statement of the law in force when he was writing.

P.S. 2,12,3 shows that the emergency cases were the paradigm cases of depositing.

As an alternative interpretation Rotondi<sup>67</sup> suggests that the text merely says that when one deposits in metu ruinae incendii naufragii ..... causa one also has here (as in the ordinary cases) a deposit. A preferable interpretation, however, is that of Litewski<sup>68</sup> who remarks that the text simply proves that its author, no doubt on the basis of the edict which must have been known to him, was aware of the difference between the causae deponendi. It does not show that necessary deposit was the sole object of the sanction of the XII Tables.

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66. Westromisches Vulgarrecht. Das Obligationenrecht (Weimar, 1956) p.169ff; also Litewski, SDHI 43 (1977), p.191.

67. Scritti 2, p.17.

68. A.G. 1976, p.5 n.7 (as in offprint).



Had the action of the XII Tables covered all deposits the praetor would not have favoured the dishonest deposittee by reducing the double penalty for these cases.

Rotondi<sup>69</sup> combats Jhering's assumption that the praetor would not have reduced the sanction of the XII Tables had they dealt with ordinary deposit. He argues that it was the policy of the praetor to mitigate the severity of the early law, as, for example, in his substitution of a four-fold penalty in place of the capital punishment for manifest theft established by the XII Tables. Maschi,<sup>70</sup> with some justification, objects that this is an inadequate explanation because in the case of manifest theft the praetor was doing away with the outmoded capital punishment rather than ameliorating the position of the thief as such. Yet, in Rotondi's defence, one might say that it is a fact that from the time of the introduction of the edict an action in simplum was regarded as the appropriate sanction in cases of ordinary deposit. There can, therefore, be no fundamental objection to the possibility that an action in duplum established by the XII Tables for such cases was regarded as too severe by the time of the praetorian edict, especially bearing in mind the gratuitous nature of depositum.

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69. Scritti 2, p. 24f; also, Kaser, R.P.R. 1 (Munich, 1955) p.447.

70. Op. cit., p.132.

Also one might note that in D.16.3.1.4, when dealing with the distinction between ordinary and necessary deposit, Ulpian says that in the former case the depositor ought to be content with simple damages (contentus esse debet simplio). Such a statement using the verb debere is possible support for the argument that the praetor was introducing an action in simplum where one in duplum existed before. Use of the word "ought" permits the inference that at an earlier period the depositor would have been entitled to receive more and that this was the position changed in the edict.<sup>71</sup>

Maschi's argument based on D.16.3.1.4 (Ulp 30 ed.)

The essential point of the argument, as we have seen, is that in D.16.3.1.4 the failure to return a deposit in one of the emergency cases was referred to as a crimen.

Before Maschi wrote, the objection had already been made by

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71. Perhaps the argument should not be pressed too far. The debet formulation is also consistent with the view that the action of the XII Tables was restricted to cases of deposit made in emergency. Starting from the position of an action in duplum which lay where the depositor was unable to exercise a fair choice of deposittee and of an action introduced at a later date (edict) which lay where the depositor was able to exercise a fair choice, a jurist might reasonably say that here the depositor OUGHT to be content with single damages.

both Beseler<sup>72</sup> and Albertario<sup>73</sup> that the text is corrupt. In addition, we should note the implication of the words crescit perfidiaae crimen. As the discussion concerns both ordinary and necessary deposit at this point of the commentary, the use of crescit suggests that the word crimen applies also to a failure to return property in the former case; the "crime" is simply worse in an emergency deposit. So extended a sense borne by crimen in this context, whether or not it is taken as showing that the word is not classical, deprives Maschi's argument of its force. It is not possible to conclude that the text distinguishes between the crimen of necessary deposit dating from the XII Tables and the private wrong of ordinary deposit introduced later.

Where do these arguments leave us? To begin with we should state the strong likelihood that the remedy of the XII Tables was an independent action on deposit. As we said earlier, this is suggested first of all by the extract from P.S. Further support for this view is furnished by the very existence of an action in duplum in the edict. It would indeed be quite a coincidence

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72. Beiträge 3 (Tubingen, 1913), p.12.

73. Studi 3 (Milan, 1936), p.189.

that deposit was singled out for special treatment<sup>74</sup> in the XII Tables with an action in duplum, that there was an action in duplum mentioned in the edict which was perpetual - arguably a surprising feature of a purely praetorian penal action - yet there was no connection between these two remedies. If there is a connection between the two remedies this is strong evidence that the action of the XII Tables was an independent action on deposit.

The problem, therefore, is to determine the precise scope of the action on deposit established by the XII Tables. However, on this point little help can be gleaned from the arguments we have examined so far; with the possible qualification that had the XII Tables dealt with all deposits it would be surprising that the praetor should have ameliorated the position of the dishonest deposittee by substituting single damages for the duplum. Nevertheless, if we do accept that the arguments examined are indecisive we are left with the presumption created by the extract from P.S. itself. On the basis of this text we argued that the action of the XII Tables covered all deposits. In the absence of strong arguments to the contrary this, therefore, must be our conclusion.

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74. In contrast with, for example, commodatum which has certain similarities with depositum, see post.

But in fact there are grounds on which to question the likelihood that the action of the XII Tables covered all deposits. The transactions which later came to be known as commodatum and depositum had the important features in common, (1) that they arose out of amicitia, that is, they took place between friends, and (2) each transaction entailed a datio rei which imposed upon the recipient an obligation to return the property in question at a later date.<sup>75</sup> It is thought that before the introduction of special legal remedies a failure to return the property in these cases was regarded as a breach of fides.<sup>76</sup> The transactions differ, as analysed by later jurisprudence, in respect of the purpose of the datio rei. In commodatum use of the property is intended by the parties, but in depositum its safekeeping is intended.

Given the essential similarity between these transactions, in particular the fact that each entailed the transfer of property between friends on the understanding that it would be returned at a later date, it would indeed be remarkable if the law had chosen to sanction the one and not the other. This would be the case had the action in duplum of the XII Tables covered all deposits, because,

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75. See in particular, Maschi, La Categoria, p. 97ff.

76. Maschi, op. cit., p. 97ff.

it is agreed, there was no independent sanction for commodatum until the introduction of an action in factum circa the time of Quintus Mucius Scaevola.<sup>77</sup> Why, therefore, should deposit, by comparison, have been singled out for special treatment in the XII Tables?

If there was a difference in treatment afforded by the law it must have been because of the different purpose of the datio rei, because this is the main feature which distinguishes the transactions. But such an hypothesis is highly unlikely. The important point is that in both transactions property had been handed over which was to be returned. The purpose of the datio rei is a subsidiary consideration. Therefore, as compared with commodatum there is no obvious reason why deposit should have assumed a special position in the mind of the legislator of the XII Tables. The depositary performs a gratuitous service for a friend and it is he against whom an action in duplum is alleged to have been given by the XII Tables. Yet, if this were so, would the borrower, who is himself the person receiving the gratuitous service, have been free from special sanction where he failed to return the object? Surely not!

One possibility which presents itself on the basis of the foregoing observations is that if at the time of the XII Tables the fine distinctions of classical law between

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77. Watson, Law Making in the Later Roman Republic (Oxford, 1974), p. 43f.

commodatum and depositum did not exist, is it conceivable that the action in duplum sanctioned both transactions? The main difficulty with this view is that in the later history of depositum there appears a praetorian action in duplum which is likely to have been derived in some way from the remedy of the XII Tables. Taken in conjunction with the statement in P.S. that the action of the XII Tables lay ex causa depositi the inference is that this remedy was an action on deposit alone.

We conclude therefore that the XII Tables certainly established an actio depositi of sorts. A comparison between the position in early law of commodatum and deposit suggests, however, that this will not have concerned all cases of deposit. A clue to the precise scope of the action, we suggest, may be found in Plautus.

#### Plautus.

We will now examine the incidence of depositum in the plays of Plautus. We choose these plays because they constitute the substantial source closest in time to the promulgation of the XII Tables and therefore provide a useful yardstick against which to assess Paul's statement on the early history of deposit. We will determine what terminology is used in the plays to denote depositing, with a view to seeing whether this was a well-formed institution in the time of Plautus, consistent with its having given rise to a special action 250 years earlier in the XII Tables.



It is perhaps a surprising feature of the plays that they contain such a high incidence of situations which we can classify as depositing. However, to a large extent this incidence can be attributed to the theme of aurum out of whose entrusting for safekeeping, often with the untrustworthy, Plautus derives much comic effect. Given the high incidence of deposit in the plays, if it did in fact give rise to a special action in the XII Tables we should be able to detect from the terminology a relatively well defined institution which reflects its status as a legally protected, and hence legally defined, practice. At the very least a more precocious development in terms of the terminology used to denote depositing should be in evidence as compared with practices such as loan for use (the later commodatum) which had not by this time given rise to independent legal protection. Therefore, in the first instance we will be concerned with determining whether the XII Tables did in fact give rise to a special action on deposit. If this were the case we assume that it should be possible to identify a technical term for depositing. By "technical" we mean a term which denotes depositing specifically which will have been used in the XII Tables to describe the sort of transaction which gave rise to the action in duplum. Secondly, we hope to identify from the incidence of such a term, if it exists, the precise scope of the XII Tables action. In so far as we are solely concerned with terminology it is not necessary to consider the Greek influence on the plays.



The verb commendare is used six times in Plautus in the sense of entrusting something or someone into the care of another person.<sup>78</sup> But, from the nature of what is entrusted (affairs and property in general, including women and children), and the duties undertaken by the commendatee it is likely that the relationship established between the parties in these cases had a closer affinity with mandate than with what we ordinarily understand to be deposit.<sup>79</sup> A typical example of the use of the verb appears in *Trinummus* when Charmides, on going abroad, leaves his children and affairs in the care of his friend Callicles. Callicles refers to what Charmides has done in the following terms:

Tri. v.v. 113-114 ..... mihi commendavit virginem gnatam suam et rem suam omnem et illum corruptum filium.

And later Charmides, when talking of Callicles, says:

Tri. v. 877 .... cui ego liberosque bonaque commendavi, Calliclem.

These two extracts, which illustrate the dominant usage of the verb in the plays, suggest a broader undertaking on the part of Callicles than that of a mere deposittee. Callicles tells us that Charmides has entrusted to him rem suam omnem, and therefore, while Callicles is clearly obliged to keep safe the affairs of his friend, part and parcel of this is

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78. *Cistellaria*, 245; *Trinummus*, 113, 877, 1083; *Mercator*, 702.

79. See the entries on commendo, mando, Ernout et Meillet, *Dictionnaire Etymologique de la Langue Latine*. It is thought by some scholars that commendare did denote depositing at this time; Rotondi, *Sc.* 2, p.12 and Gandolfi, *Il Deposito*, p.40.

the further element of administration of those affairs. So, for example, he feels obliged to procure dos for Charmides' daughter, and, we can reasonably infer that he also took an active interest in the running of Charmides' farm. Furthermore it appears that Megaronides believes that Callicles, by virtue of his broad mandate, has assumed the position of guardian to his friend's children, which again implies that more was required of him in his undertaking than mere safekeeping. Also in this context particular note should be taken of the fact that the Swindler tells us that Callicles is the person to whom Charmides (v. 956) rem aibat mandasse hic suam.

Therefore there is no evidence in Plautus that commendare denotes specifically the giving of a deposit. Sometimes, indeed, the commendatee's undertaking may have included, along with everything else, the looking after of a deposit, as, for example, in *Trinummus* where Callicles is also safeguarding a hoard of gold. But, when the giving of a deposit is specifically denoted in the plays, different terminology is used.

The terms in custodelam concredere<sup>80</sup> and servandum dare<sup>81</sup> are used once and three times respectively in the comedies.

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80. Mercator, 233; Mostellaria, 407.

81. Mercator, 238; Bacchides, 338, Asinaria, 676.

The fact that Demipho in Mercator uses both alternately to describe the same situation of the giving of a goat into care would seem to suggest that for Plautus the terms were synonymous and therefore interchangeable.<sup>82</sup>

In Bacchides, Nicobulus, relieved that his son has given his gold into the safekeeping of a rich man, surmises that as a result it will be easier to get it back.

Bacchides v.v. 337-9. Istuc sapienter saltem  
fecit filius, cum diviti homini id aurum  
servandum dedit; ab eo licebit quamvis subito  
sumere.

And in Asinaria, Leonida says, illic hanc mihi servandum dedit to tell his master's son that a fellow slave has given him his wallet to look after. We see, therefore, that both terms are used to denote the giving of something into the safekeeping of another person. Indeed each is descriptive, the purpose of the conveyance being precisely the custodia or 'safekeeping' which is expressly stated in the term.

The restricted use of the above two terms has to be viewed in the context of the large number of cases occurring in the plays where one person gives to another something to look after. The terminology used in the vast majority

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82. Cf. Burillo, op. cit., p.243.

of these cases is the verbs concredo<sup>83</sup> and credo<sup>84</sup> in the sense of 'to trust' or 'entrust', the further element of 'into safekeeping' having to be inferred from the context. In Aulularia when the house god tells the audience that his deceased master had left a pot of gold in his keeping, he says:

Aul. v.v. 6-7 sed mi avos huius obsecrans  
concredidit thesaurum auri clam omnis.

Similarly Men. Sosicles in Menaechmi, berating himself for leaving his wallet and money in the care of his slave Messenio, states:

Men. v.v. 688-9 Nimis stulte dudum feci, quom  
marsuppium Messenioni cum argento concredidī.

And in Baccides, Nicobulus exclaims that he has trusted his money to the care of a thief of a friend.

Bacc. v. 275. Deceptus sum, Autolyco<sup>85</sup>  
hospiti aurum credidi.

Finally to denote the giving of a deposit the verb deponere is used twice in the plays. In Baccides, Chrysalus tells his master that his gold has been left with a priest of Diana at Ephesus.

Bacc. v. 306. Nos apud Theotimum omne  
aurum deposivimus.

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83. Some examples of the use of the verbs in this sense: concredo, Aulularia, 6-7, 581, 585, 615; Bacchides 1664; Trinummus, 141, 144, 957; Persa, 441.  
84. Credo, Curculio, 541; Aulularia, 15; Pseudolus, 628, 629, 632, 633, Asinaria, 501, 503, 572; Persa, 432, 435; Menaechmi, 689.  
85. A noted thief, the grandfather of Ulysses.

And in Curculio, during an interchange between Therapontigonus and Lyco, Ther. refers to the money which he had left with the banker and which he is now attempting to recover.

Curc. v. 536 Num nisi tu mihi propere properas dare eam triginta minos quos ego apud te deposivi, vitam propera ponere.

What does this survey of the main terminology used in Plautus tell us about the early history of deposit? In the plays we have four terms used to denote the giving of something into the care of another person (depositing), but, not once is any of these terms used in a context from which we can infer that legal consequences resulted from the transaction. This, in and of itself, is not significant. However, the further question we do have to answer is whether any of these terms was a technical legal term which could accurately denote the transaction of deposit which gave rise to the action in duplum of the XII Tables.

Credere we find is the term used most often in Plautus to describe depositing. It cannot, however, have been a technical term in this context. We have observed that where it is used in the plays it is necessary to infer from the circumstances of each particular case that the intended purpose of the conveyance was one of safekeeping. Credere is not a term which signifies depositing exclusively. In Persa, for example, we find Dordalus musing over his

righteousness in giving loans without security.

Persa v.v. 476-8. Sed ut ego hodie fui  
benignus, ut ego multis credidi, nec satis  
a quiquam homine accepi: ita prosum credebam  
omnibus; nec metuo, quibus credidi hodie, ne  
quis mi in iure abiurassit.

Credere can therefore also signify the giving of a loan and we do in fact find it employed in the sense of mutuum dare throughout Plautus<sup>86</sup>. Maschi<sup>87</sup> shows that it means, 'affidare qualche cosa ad altrui, commetterla alla di lui fedelta', and that it is used in the context of a certain group of transactions (originally gli arcaici negozi di mutuo, deposito e comodato) which have in common the features that something is entrusted to another person on the understanding that the same thing or tantundem will be given back at a later date.<sup>88</sup> Hence credere is a generic term used in connection with transactions of which giving for safekeeping is but one example. It expresses the fact of datio in fidem which is common to each, therefore its use as a technical term denoting depositing alone is inconceivable.

Whereas credere is a broad, imprecise term in this context, servandum dare and in custodelam concredere

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86. See credo; Lodge, Lexicon Plautinum.

87. Tutela Fedecommissi. Contratti Reali, Studi Volterra 4 p.667ff at p.744. See also, Lombardi, Dalla Fides Alla Bona Fides (Milan, 1961), p.29 n.36 and p.161.

88. La Categoria, p.110.

are both descriptive of the purpose of the datio and hence, prima facie, appear to be terms which denote depositing specifically. Certainly in most occurrences in Plautus the two terms identify a circumstance which is more readily a deposit than any other recognisable transaction. In Bacchides (v. 338) we find servandum dare is used of a deposit where deponere was used shortly beforehand (v. 306), and, in an extract from Quintus Mucius's De Iure Civile, the term clearly refers to deposit.<sup>89</sup> Also in D.16.3.1 pr. (Ulp. 30 ed.) we are told that depositum est, quod ad custodiendum aliqui datum est. However, notwithstanding this association, both terms do not always refer to depositum as distinct from other transactions where safekeeping is the object of the transfer of the property. This is illustrated first of all by D.16.3.1.8 (Ulp. 30 ed.)<sup>90</sup>

D.16.3.1.8 (Ulp. 30 ed.) Si vestimenta servanda balneatori data perierunt, si quidem nullam mercedem servandorum vestimentorum accepit, depositi eum teneri et dolum duntaxat praestare debere puto: quod si accepit, ex conducto.

We see that servandum dare does not distinguish depositum and locatio conductio because the purpose of the conveyance is 'safekeeping' in each case. Indeed the term servandum dare is used in this text precisely to leave open the nature of the contract where the use of

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89. Aulus Gellius, Noctium Atticarum 6,15,2, see post.

90. There is, of course, a danger in using late classical texts to infer a usage for the time of Plautus.



the verb deponere would have decided the matter in terms of deposit. Precisely the same consideration applies in the following text, D.16.3.1.9, where custodiendum (dare) is used.

D.16.3.1.9 (Ulp 30 ed) Si quis servum custodiendum coniecerit forte in pistrinum, si quidem merces intervenit custodiae, puto esse actionem adversus pistrinarium ex conducto: quod si operae eius servi cum custodia pensabantur...praescriptis verbis datur actio: si vero nihil aliud quam cibaria praestabat nec de operis quicquam convenit, depositi actio est.

A parallel is found in the use of utendum dare, this time in Plautus. In Persa (v. 118) the statement ut nummos sescentos mihi dares utendos shows that utendum dare does not necessarily distinguish commodatum and mutuum because utendum is a feature of both loans.<sup>91</sup> For this reason, Ferrini<sup>92</sup>, who was concerned with combating Karlowa's<sup>93</sup> thesis that utendum dare and servandum dare were technical terms of the old ius civile, observes of utendum dare, 'inoltre il gerundio utendum e tutt' altro che una designazione molto precisa dello scopo del contratto. Per lo meno l'uti non specifica il negozio ...' What Ferrini says here of utendum dare applies equally to servandum dare.

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91. Ferrini, *Storia e Teoria del Contratto di Commodato nel Diritto Romano*, Opere 3, p.81ff at p.94 believes that utendum dare is also used even of a deposit in Plautus.

92. Op. cit., p.98.

93. R.RG. 2, p.601ff.



Therefore could servandum dare have been a technical term used in the XII Tables for depositing? Balanced against the impression of the term two observations should be made. Firstly Quintus Macius uses it in the sense of depositing in his De Iure Civile.<sup>94</sup>

Aulus Gellius, Noct. Att. 6,15.2. Itaque Q. Scaevola in librorum quos de iure civili composuit verba haec posuit: quod cui servandum datum est si id usus est, sive quod utendum accepit ad aliam rem atque accepit usus est, furti se obligavit.

Also, we know from D.13.6.1.1<sup>95</sup> that the equally imprecise term utendum dare appears, at one time, to have been used in a technical sense for commodatum<sup>96</sup>.

Nevertheless it is unlikely that servandum dare was a technical term for depositing which went back to the XII Tables. Utendum dare is also found in Plautus yet we know that as yet there was no independent legal protection associated with it. Even if later it was used for a while in a technical sense for commodatum,

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94. There may have been special reasons for the use of servandum dare in this text. It stresses the element of safekeeping in the context of a discussion of furtum constituted by usus where the purpose of the transaction was servandum.

95. D.13.6.1.pr. (Ulp. 28 ed) Quod quis commodasse dicetur de eo iudicium dabo. I. Huius edicti interpretatio non est difficilis. Unum solummodo notandum, quod qui edictum concepit commodati fecit mentionem, cum Paconius utendi fecit mentionem....

96. Pastori, Il Commodato nel Diritto Romano (Milan, 1954), p.19ff; cf, Watson, Obligations, p.168f.

it was not long before it was discarded as unsatisfactory.<sup>97</sup> Furthermore we must bear in mind that the verb deponere is found in Plautus. This is important in two respects: firstly it is a term which denotes depositing specifically and hence if there were a technical legal term at the time it is likely to have been this. Secondly, deposit and loan for use in Plautus are to be distinguished precisely through the appearance of such an exact term as deponere for deposit. Commodare, the corresponding term for loan for use had still to develop the technical legal meaning which it had in classical law.<sup>98</sup> It is consistent with the information which we have - that deposit was sanctioned by the XII Tables - that we should in fact be able to distinguish these transactions on the basis of their terminology. In Plautus only the appearance of deponere sets deposit aside from loan for use in this particular respect.

We therefore come to perhaps the not surprising conclusion that of the terminology found in Plautus the verb deponere is most likely to have described the transaction sanctioned by the action in duplum of the XII Tables. Now we must determine the precise scope of that action.

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97. See Pastori, op. cit., p.7ff.

98. Pastori, op. cit., p.7ff who shows that commodare at the time of Plautus meant 'procacciare un vantaggio gratuito' which was not necessarily an object taken on loan.

We have accepted that the action in duplum of the XII Tables was a special action on deposit but that it is unlikely that it covered all deposits. This means that the action must have had a narrower scope. Therefore, the first possibility to explore is that it lay tumultus incendii ruinae naufragii causa.

The idea that it was the XII Tables which first used this phrase and allowed the actio depositi only in these cases is doubtful. This is shown by the fact that the formulation tumultus incendii ruinae naufragii causa<sup>99</sup> is not one which is associated only with depositum. The phrase is found in the Digest in other contexts,<sup>100</sup> most notably in connection with the edict, de incendio ruina naufragio rate nave expugnata<sup>101</sup>. This suggests that the granting of special actions in such circumstances was the work of the praetor, possibly as a matter of public policy.<sup>102</sup>

A clue to the scope of the action of the XII Tables may lie in the nature of the relationship between the parties involved in a deposit. In most cases deposits are made

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99. Or variations on this phrase.

100. See the respective entries in the Vocabularium Iurisprudentiae Romanae.

101. See D.47.9.

102. As is suggested by D.16.3.1.4 (Ulp. 30ed) ..cum vero extante necessitate deponat, crescit perfidiae crimen et publica utilitas coercenda est vindicandae rei publicae causa; also, D.47.9.1.1 (Ulp. 56 ed) Huius edicti utilitas evidens et iustissima severitas est si quidem publice interest nihil rapi ex huiusmodi casibus.

with friends. Like loan for use, the transaction is part of the reciprocity between such individuals. But, unlike loan for use, deposits might also be made with persons who do not stand in such a close relationship. The action in duplum of the XII Tables may have sanctioned precisely these transactions.

In support of this hypothesis we should observe that the verb deponere in Plautus is used only twice - once in connection with a deposit made with the keeper of a temple<sup>103</sup> and once with a banker. It is therefore used precisely in conjunction with deposits at-arms-length where property is entrusted to a person with whom there is no close relationship, by virtue of his representing an institution which holds itself out as a safe place for depositing. On the basis of this evidence alone we cannot of course be certain. However, the idea that the XII Tables sanctioned only these deposits offers a plausible explanation of the nature of that action. Vidal has shown that in classical law an actio depositi in factum might be brought against the keeper of a temple<sup>104</sup>. Equally the XII Tables may have provided an action in duplum against such an individual. In time this action may also have been allowed against others, such as bankers, where they held themselves out as safe places to deposit.

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103. Deposits in temples were common in the time of Plautus, see Vidal, *Le Dépôt in Aede*, RHD 1965, p.545ff.

104. Op. cit., p.570ff. However, Vidal rejects the idea that there was any connection between the action of the XII Tables and deposits in temples.

The last point to determine is the relationship between this remedy and the praetorian action in duplum for necessary deposit. With the introduction of the edict on depositum all deposits would be sanctioned by the action in factum. In addition, by this time an actio furti will have been available against the deposittee for unauthorised use of the property<sup>105</sup> and for a fraudulent failure to return it.<sup>106</sup> These were regarded as adequate sanctions in place of the action in duplum of the XII Tables. However, we have argued that the action of the XII Tables and the action in duplum for necessary deposit were related in some way. We must assume that the praetor generalised the earlier remedy and made it available tumultus incendii ruinae naufragii causa. Such a move would not be incomprehensible, because in the past only certain deposits at-arms-length had been sanctioned, and yet in many cases such deposits will have occurred only as the result of emergency.

The idea that the action of the XII Tables had a narrow scope and was generalised by the praetor to cover necessary deposit offers a solution to certain points

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105. Aulus Gellius, Noct. Att. 6,15,2.

106. See Thomas, Studi Volterra 2, p.759ff.

which have caused difficulty in the history of depositum. It explains why the praetorian action in duplum for necessary deposit was a perpetual remedy. It explains why, when he introduced this action, the praetor said iudicium dabo.<sup>107</sup> Also, it shows that when he introduced the action in factum for ordinary deposit the praetor was not favouring the dishonest depositor.<sup>108</sup>

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107. Cf, Longo, Il Deposito, p.56f.

108. Cf, Jhering, Schuldmoment (French translation), p.37. Even in the cases originally sanctioned by the XII Tables, by the late republic an actio furti was available where it probably was not in earlier law.

#### CHAPTER IV

WHICH OF THE TWO FORMULAE FOR DEPOSIT WAS THE OLDER?

WHICH OF THE TWO FORMULAE FOR DEPOSIT WAS THE OLDER?

By the time of Gaius there were two actions on deposit, one formulated in factum and the other formulated in ius<sup>1</sup>. It is now universally agreed that the action in factum was the older. In this chapter we will examine the evidence on which this view is based. We will affirm the accepted doctrine but suggest that some of the arguments on which it is founded are misconceived.

Firstly, evidence that the action in factum was older is drawn by both Rotondi<sup>2</sup> and Burillo<sup>3</sup> from Gaius, 4.60.

Gaius 4.60: Sed nos apud quosdam scriptum invenimus, in actione depositi et denique in ceteris omnibus ex quibus damnatus unusquisque ignominia notatur, eum qui plus quam operteret demonstraverit litem perdere: veluti si quis una re deposita duas pluresve (se de)posuisse demonstraverit, aut si is cui pugno mala percussa est in actione iniuriarum etiam aliam partem corporis percussam sibi demonstraverit. Quod an debeamus credere verius esse diligentius requiremus. Certe, cum duae sint depositi formulae, alia in ius concepta, alia in factum, sicut supra quoque notavimus, et in ea formula quae in ius concepta est initio res de qua agitur demonstratorio modo designetur, deinde inferatur iuris contentio his

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1. Gaius, 4.47; 4.60.

2. Scritti 2, p.31f.

3. Las Formulas de la actio depositi, SDHI 28 (1968) p.233 ff at p.235f; also, Longo, Il Deposito (Milan, 1946), p.4 and Maschi, La Categoria dei Contratti Reali, (Milan, 1973), p.153f.



verbis: quidquid ob eam rem illum illi dare facere oportet, in ea vero quae in factum concepta est statim initio intentionis alio modo res de qua agitur designetur his verbis: si paret illum apud (illum rem) illam deposuisse, dubitare non debemus quin, si quis in formula quae in factum composita est plures res designaverit quam deposuerit litem perdat, quia in intentione plus posuisse videtur.....4.

In this text Gaius discusses the effects of plus petitio. He tells us that apud quosdam it is written that plus petitio in the actio depositi results in loss of the claim. Gaius proceeds to consider whether this view is to be accepted and in so doing he distinguishes between the effects of plus petitio in the formula in factum and the formula in ius for deposit. He says that in the formula in ius there is no loss of the claim because, following what he said earlier in 4.58<sup>5</sup>, by the claim of plus aut minus in the demonstratio of this formula, nihil in iudicium deducitur, et ideo res in integro manet. On the other hand, in the formula in factum the subject matter of the dispute between the parties is indicated,

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4. The remainder of the text is illegible; see De Zulueta, The Institutes of Gaius 1, p.260.
  5. Gaius, 4.58. Si in demonstratione plus aut minus positum sit, nihil in iudicium deducitur, et ideo res in integro manet, et hoc est quod dicitur, falsa demonstratione rem non perimi.

In 4.60 (which is defective, see note 4 above) Gaius does not expressly state that there is no loss of the claim in this case, nor that he is following 4.58 in reaching this decision. However, that this was his decision is likely given the development of the arguments from 4.53-60.

not in a demonstratio but at the beginning of the intentio. For this reason, on the basis of 4.53<sup>6</sup>, Gaius concludes that the pursuer who overclaims in the action in factum loses his claim.

The question asked by Rotondi and Burillo is, why did the jurists (quidam) to whom Gaius refers not make the essential distinction which he does between the position in the action in ius and the action in factum? The reason they believe is that in the time of these earlier jurists<sup>7</sup> the action in factum was the only action for deposit, the formula in ius not yet having come into existence.

This conclusion is attacked by Watson<sup>8</sup>. He argues that Rotondi and Burillo fail to take sufficient account of the fact that according to Gaius the earlier jurists (quidam) maintained that the claim in the actio depositi was lost by the pursuer qui plus quam oporteret demonstraverit. Watson continues, 'demonstraverit can only refer to a demonstratio in the formula and there is no demonstratio in the formula in factum for deposit though there is for the formula in ius.'

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6. Gaius, 4.53. Si quis intentione plus complexus fuerit, causa cadit, id est, rem perdit .....

7. According to Rotondi, Scritti 2, p.41, who is followed by Burillo, op.cit., p.235, these writers must have been earlier than Gaius in so far as the action in ius was not yet in existence in their time, whereas it was by the time of Gaius. Rotondi believes, however, that they could not have been Sabinus or Cassius as Gaius would have mentioned these jurists by name.

8. The Law of Obligations in the Later Roman Republic (Oxford, 1965), p.158ff; followed by Gandolfi, Il Deposito (Milan, 1976), p.87.

Hence the jurists to whom Gaius is referring can have been concerned only with the formula in ius which must accordingly have been in existence in their time'. Watson's argument in turn is rejected by Maschi<sup>9</sup>. Because Gaius points out that in the formula in factum the subject matter in dispute between the parties is indicated at the beginning of the intentio, Maschi believes that demonstraverit cannot be understood as referring to a demonstratio which appeared only in the formula in ius. That is to say, Maschi believes that Gaius would not introduce points concerning the intentio of the formula in factum into a discussion which on Watson's analysis only concerned the demonstratio of the formula in ius<sup>10</sup>. Therefore, as far as the Italian scholar is concerned, demonstraverit as used by the earlier jurists should not be understood in the technical sense given to it by Watson. Rather, these jurists must be understood simply to have said that the pursuer who overclaims in the actio depositi loses his claim. But the word demonstraverit appears in a passage which is part of a discussion of plus petitio in the demonstratio (4.58ff). It is therefore highly unlikely that Gaius used the term in the general sense implied by Maschi. Furthermore, there is in fact a perfectly good reason why Gaius introduces the point concerning the intentio of the formula in factum into the discussion where he does. This can be appreciated by looking back to the very beginning of his discussion of

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9. Op.cit., p.153 n.7.

10. This is also Burillo's reason for interpreting the text as he does; op.cit., p.235.

plus petitio. In 4.53 he says that a pursuer who overclaims in his intentio fails in his case. In 4.58 he says that plus petitio in the demonstratio does not result in loss of the claim. Finally in 4.60 Gaius tells us that certain jurists were of the opinion that in the actio depositi and the infaming actions in general plus petitio in the demonstratio resulted in loss of the claim. Watson plausibly argues that these jurists were 'trying to introduce an exception to the rule that plus petitio in the demonstratio does not affect the plaintiff's case'<sup>11</sup>. What follows after quod an debeamus credere verius esse, diligentius requiremus is Gaius's response to this attempt. He uses the actio depositi as the exemplar of the infaming actions<sup>12</sup>, and, in conformity with 4.53, states that in the formula in factum overstatement in the intentio results in loss of the claim. However, in conformity with 4.58, he then affirms that overstatement in the demonstratio of the formula in ius does not involve loss of the

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11. In Watson's opinion, op.cit., p.159f, the reason these jurists wished to introduce this exception was to restrain plaintiffs in infaming actions. Watson argues that none of the infaming actions had an intentio for a certum, hence there could be no plus petitio in the intentio. Most of the actions, however, had a demonstratio in which the plaintiff could overclaim. Where this occurred Watson suggests that the jurists to whom Gaius refers were of the opinion that the plaintiff should lose his claim.

12. The actio depositi is no doubt singled out by Gaius precisely because it had two formulae, on the basis of which he could draw the distinction between the effects of plus petitio in an intentio or demonstratio. The earlier jurists, even if they did not single out deposit, would only have had the action in ius in mind because only this had a demonstratio.

claim.<sup>13</sup> Effectively, therefore, Gaius's response to the attempt by these jurists is in the negative and it is framed in terms of a re-affirmation of the rules laid out in 4.53 and 4.58, namely, you lose your claim if you overstate in an intentio but not if you overstate in a demonstratio.

Watson is therefore correct in suggesting that the jurists (quidam) to whom Gaius refers can have been concerned only with the formula in ius. As a result Gaius, 4.60 provides no evidence to support the view that the formula in factum was the older of the two actions on deposit.

Another argument that the formula in factum was the older remedy is advanced by Ferrini<sup>14</sup> on the basis of the absence of deposit in a list of infaming actions found in the Tabula Heracleensis, Lex Iulia Municipalis of 45 B.C. Ferrini believes that infamia was a characteristic only of civil law actions, hence he suggests that the omission of deposit from this list is to be explained by the fact that the formula in ius had yet to be introduced when the statute was promulgated.<sup>15</sup> However,

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13. The manuscript is illegible but that this was Gaius's response can safely be inferred from his discussion of plus petitio.

14. Storia e Teoria del Contratto di Commodato nel Diritto Romano, Opere 3, p.81ff at p.92.

15. This suggestion is of course based on the assumption that the actio depositi in factum was already in existence by the time of the Lex Iulia.

we shall see<sup>16</sup> that there is no reason to think that only civil law actions were infaming; also that there is some evidence to suggest that the actio depositi in factum itself was an infaming action.

Next we turn to the evidence provided by the order of treatment of the two deposit formulae in the juristic commentaries. But, firstly, we should observe that in Inst. 4.47 Gaius reproduces the wording of the formula in ius before that of the formula in factum. The reason for this is not that the formula in ius was the older of the two formulae. Earlier, as part of his discussion of the partes formularum, Gaius notes that generally there are two sorts of formulae, those framed in ius (4.45) and those framed in factum (4.46). It is not surprising that Gaius should mention the civil law formulae before those framed in factum because in his Institutes he was primarily concerned with the institutions of the civil law. Equally, when in 4.47 he writes that in some specific cases (as in deposit and commodatum) there is both a formula in ius and a formula in factum, it is natural that he should follow the order established earlier and mention the civil law formula first. On the other hand, in the commentaries of the jurists - as is clearly shown by Lenel<sup>17</sup> with respect to Ulpian's edictal commentary on depositum -

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16. A full discussion of this issue is found in the next chapter.

17. Pal. 2, p.612f.



discussion of the formula in factum precedes discussion of the formula in ius. The likely reason is that the formula in factum was the first to be introduced and hence the first action to be commented upon by the jurists<sup>18</sup>.

Cicero on a number of occasions lists the bonae fidei iudicia but never mentions depositum or commodatum in this context.

De Officiis, 3.17.70. Q. quidem Scaevola, pontifex maximus, summam vim esse dicebat in omnibus iis arbitriis, in quibus adderetur ex fide bona, fideique bonae nomen existimabat manare latissime, idque versari in tutelis societatibus, fiduciis mandatis, rebus emptis venditis, conductis locatis, quibus vitae societas contineretur; in iis magni esse iudicis statuere, praesertim cum in plerisque essent iudicia contraria, quid quemque cuique praestare oporteret.

Topica, 10.42. Si tutor fidem praestare debet, si socius, si cui mandaris, si qui fiduciam acceperit, debet etiam procurator.

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18. See also, Taubenschlag, Zur Geschichte des Hinterlegungsvertrages im römischen Recht, Grünhuts Zeitschrift 34 (1907), p.683ff at p.698; Ferrini, Opere 3, p.88; Rotondi, Scritti 2, p.31; Longo, op.cit., p.4; Burillo, op.cit., p.235; Maschi, op.cit., p.154.  
But cf, Gandolfi, op.cit., p.83f.

Topica, 17.66. In omnibus igitur eis iudiciis, in quibus ex fide bona est additum, ubi vero etiam ut inter bonos bene agier oportet, in primisque in arbitrio rei uxoriae, in quo est quod eius aequius melius, parati eis esse debent. Illi dolum malum, illi fidem bonam, illi aequum bonum, illi quid socium socio, quid eum qui negotia aliena curasset ei cuius ea negotia fuissent, quid eum qui mandasset, eumve cui mandatum esset, alterum alteri praestare oporteret, quid virum uxori, quid uxorem viro tradiderunt.

De Natura Deorum, 3.30.74..... inde tot iudicia de fide mala, tutelae, mandati, pro socio, fiduciae, reliqua quae ex empto aut vendito aut conducto aut locato contra fidem fiunt .....

The absence of depositum and commodatum is taken to show that their respective bonae fidei formulae had not yet come into being<sup>19</sup>. One possible objection to this deduction is that Cicero's lists were not exhaustive, but Ferrini<sup>20</sup> persuasively argues that while this may be so of the individual lists, when taken as a whole their evidence is conclusive. Karlowa,<sup>21</sup> however, in support of his belief that the formula in ius was the older formula both for depositum and commodatum,

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19. Ferrini, op.cit., p.89f. Rotondi, op.cit., p.29f; Longo, op.cit., p.4; Burillo, op.cit., p.235; Kaser, RPR 1 (Munich, 1971), p.535 n.6; Maschi, op.cit., p.152; Gandolfi, op.cit., p.84ff.

20. Op.cit., p.89f.

21. Römische Rechtsgeschichte 2 (Leipzig, 1901), p.603.



suggests that there is in fact positive evidence to show that Cicero was not listing all the bonae fidei iudicia known in his time. He points out that in the passage from De Officiis, having listed the bonae fidei iudicia, Cicero says that in plerisque there are iudicia contraria. Yet, of the six bonae fidei iudicia mentioned by Cicero in this passage, Karlowa thinks that only three had iudicia contraria. Therefore, to explain in plerisque . . . ., he assumes that Cicero had in mind other bona fide actions which he did not list; in particular those for commodatum and depositum. Rotondi<sup>22</sup> counters this argument with the observation that, besides there being a contrarium iudicium at the time for tutela, mandate and fiducia, an actio pro socio brought against a partner who had earlier been the pursuer in the same action was also seen as a contrary action by the veteres because there had been an alteration in the formula. If this view is accepted one has iudicia contraria in four out of the six bona fide actions mentioned by Cicero and in plerisque is therefore perfectly intelligible.

Just how precise Cicero was being in his statement concerning the iudicia contraria we have no way of telling. Certainly had the bona fide actions for commodatum and depositum existed when Cicero wrote, it would be surprising that he did not mention them. Nevertheless, we must concede that the omission of an action (or actions) from lists is not by itself a very

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22. Scritti 2, p.30.

strong basis on which to argue that that action did not exist at the time when the list was compiled.<sup>23</sup> There could be a variety of factors to explain the omission.<sup>24</sup> However, in this particular case we can be fairly certain that these actions did not exist. The evidence from Cicero should be taken in conjunction with the absence of depositum, commodatum and pignus from the Ius Civile of both Quintus Mucius and Sabinus and from book three of Gaius's Institutes. The absence from these works on the civil law is best explained by the fact that the respective formulae in ius of these transactions were unknown in the Republic.<sup>25</sup>

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23. One example which comes to mind is the absence of commodatum from Gaius's list of bonae fidei iudicia in Inst., 4.62. Yet certainly the bona fide actio commodati existed at this time; see Pastori, Il Commodato nel Diritto Romano (Milan, 1954), p.55ff.
24. See, for example, the discussion in the next chapter of the absence of deposit from the list of infaming actions found in the Tabula Heracleensis.
25. See Watson, Obligations, p.160; Daube, JRS 38 (1948), p.113ff at p.115. The formulae in ius were certainly known to Gaius (cf 4.47). His failure to mention these contracts in book three of his Institutes is thought to be because, in compiling that work, he was following an earlier model in which depositum, commodatum and pignus were not mentioned. Contra, Schulz, History of Roman Legal Science (Oxford, 1946), p.162. Just how enduring traditional classifications can be is illustrated by the fact that Justinian, Inst., 3.14.11, following Gaius, 3.91, still discusses solutio indebiti with the real contracts, on the basis that it also gives rise to an obligation re. One further point to note is that we shall see in the next chapter that Quintus Mucius certainly referred to depositum in his Ius Civile. Reference, however, was to the action in factum.

Finally, there is a consideration of a more general nature concerning the likelihood that the actio depositi in factum was introduced earlier than the action in ius. The latter remedy directed the judge to decide the matter between the parties according to good faith: quidquid ob eam rem N<sup>m</sup> N<sup>m</sup> A<sup>o</sup> A<sup>o</sup> dare facere oportet ex fide bona. However, the action in factum gave rise to a strictum iudicium where the officium iudicis was limited to condemning if he found a particular set of facts proved.<sup>26</sup> As a result, the actio in factum was a less comprehensive remedy than the civil law action, and, that being the case, it is difficult to see what the praetor's motive might have been for its introduction had the formula in ius preceded it.<sup>27</sup>

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26. Both deposit formulae are reproduced in full by Gaius, Inst., 4.47.

27. See Pastori's similar observations on the actio commodati, op.cit., p.61. But cf, Karlowa, op.cit., p.1310ff.

CHAPTER V

THE DATE OF INTRODUCTION OF THE ACTION IN FACTUM

## THE DATE OF INTRODUCTION OF THE ACTION IN FACTUM

In this chapter we wish to determine the date of introduction of the action in factum. In doing this we will rely on the conclusions reached in two earlier chapters (a) that the scope of the action in duplum of the XII Tables was extremely narrow and (b) that the action in factum was the older of the two classical law formulae for deposit; the action in ius probably having been introduced sometime in the early Empire.<sup>1</sup> These conclusions allow us to assume that where we find an actio depositi mentioned in the work of republican jurists - as long as that remedy did not have the narrow scope of the action of the XII Tables - reference must have been to the action in factum.

The earliest jurist in whose work we find references to depositing is Quintus Mucius Scaevola (died 82 B.C.).

Aulus Gellius, Noctium Atticarum 5(7),15,2.  
Itaque Q. Scaevola in librorum, quos de iure civili composuit, XVI verba haec posuit: quod cui servandum datum est, si id usus est, sive quod utendum accepit, ad aliam rem atque accepit usus est, furti se obligavit

Quintus Mucius, we are told, said that it constituted theft (furti se obligavit) if use was made of what was given for safekeeping or if borrowed property was put to a use other than that for which the loan was made.

Rotondi,<sup>2</sup> who believes that the action in factum was

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1. Rotondi, Scritti 2 (Milan, 1922), p.38ff.

2. Scritti 2, p.33ff; followed by Maschi, La Categoria dei Contratti Reali (Milan, 1973), p.155.

introduced relatively late, not until shortly after 45 B.C.,<sup>3</sup> observes that the discussion concerns the actio furti and therefore provides no evidence to suggest that an actio depositi was known to Quintus Mucius. Gandolfi<sup>4</sup> on the other hand believes that the passage does show that Quintus Mucius knew the praetorian actio depositi. Gandolfi thinks that the action in duplum ex causa depositi of the XII Tables was none other than the actio furti nec manifesti.<sup>5</sup> He then draws attention to the past tense of the word obligavit in the text from Aulus Gellius. The use of the past tense leads him to think that in this part of his work on the civil law Quintus Mucius must have been referring to the provisions of the XII Tables and, in particular, that Quintus Mucius must have been contrasting this pre-existing regime with the position under the recently introduced actio depositi in factum. Therefore, concludes Gandolfi, Quintus Mucius knew the praetorian actio depositi. This, it must be said, is a highly dubious inference to be drawn

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3. He is so precise because, although the action is known to Alfenus, D.46.3.35 (Alf. 2 dig. a Paul ep.). Trebatius, D.41.4.2.7 (Paul 54 ed.), D.16.3.21.1 (Paul 60 ed.), D.16.3.1.41 (Ulp 30 ed.) and Ofilius D.34.2.39.1. (Iav. 2 post. Lab.) it is absent from the list of infaming actions in the Tabula Heracleensis, Lex Iulia Municipalis (45 B.C.). See post.

4. Il Deposito (Milan, 1976), p.60 and p.91.

5. Op. cit., p.59.

from the mere past tense of obligavit. Furthermore, if Gandolfi were correct, we would have to ask what a reference to commodatum (utendum dare) was doing as part of this comparison of the two actions on deposit.

Further evidence that Quintus Mucius knew the actio depositi in factum can possibly be drawn from D.13.6.5.3.

D.13.6.5.3 (Ulp 28 ed.) Commodatum autem plerumque solam utilitatem continet eius cui commodatur, et ideo verior est Quinti Mucii sententia existimantis et culpam praestandam et diligentiam et, si forte ...

Quintus Mucius was discussing the actio commodati in factum,<sup>6</sup> and therefore the text is clear evidence that this action existed in his time. If one accepts the view that the histories of commodatum and depositum were so closely linked that one can argue from one to the other,<sup>7</sup> Quintus Mucius must also have known the praetorian actio depositi.<sup>8</sup> Pastori<sup>9</sup> has, however, pointed out the dangers of such an approach. Indeed, arguably this approach would be especially dangerous if we were trying to date the introduction of the respective praetorian actions, one from the other, because of the possible influence which

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6. Ferrini, *Storia e Teoria del Contratto di Commodato nel Diritto Romano*, Opere 3, p.81ff at p.91; contra, Karlowa, R.RG. 2, p.603.

7. Ferrini, op. cit., p.92.

8. See Gandolfi, op. cit., p.85.

9. Il Commodato nel Diritto Romano (Milan, 1954), p.71.

the action ex causa depositi of the XII Tables had on the date of introduction of the actio depositi in factum. Rotondi,<sup>10</sup> for example, explains what he believes to have been the relatively late introduction of the latter remedy as due to the influence of the action of the XII Tables. On the other hand, precisely because there was no remedy in the case of gratuitous loans before the actio commodati in factum, this action may have been introduced all the earlier by the praetor.<sup>11</sup>

The last piece of evidence from which the argument can be made that Quintus Mucius definitely knew the actio depositi in factum is found in D.46.3.81.1 (Pomp. 6 ad Q.M.).

D.46.3.81.1 (Pomp. 6 ad Q.M.) Si lancem deposuerit apud me Titius et pluribus heredibus relictis decesserit: si pars heredum me interpellat, optimum quidem esse, si praetor aditus iussisset me parti heredum eam lancem tradere, quo casu depositi me reliquis coheredibus non teneri. Sed et si sine praetore sine dolo malo fecero, liberabor aut (quod verius est) non incidam in obligationem. Optimum autem est id per magistratum facere.

Watson<sup>12</sup> has observed that as far as teneri the text, which is taken from Pomponius's commentary on Quintus

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10. Scritti 2, p.33ff.

11. In fact, because the scope of the action of the XII Tables was so narrow it is likely that the existence of an action in factum for commodatum speaks for the existence of a similar action for depositum. This is confirmed by the texts from Quintus Mucius to which we refer.

12. The Law of Obligations in the Later Roman Republic (Oxford, 1965), p.165.



Mucius's Ius Civile, is in indirect speech which means that this part basically goes back to Quintus Mucius. The text is widely thought to be interpolated<sup>13</sup> but nevertheless provides clear evidence that an actio depositi was known to Quintus Mucius. Reference was certainly not to the action in ius but to the action in factum. This is shown by the statement, sed et si sine praetore sine dolo malo fecero, liberabor aut (quod verius est) non incidam in obligationem. The point is that dolus was one of the necessary conditions of the action in factum which sanctioned the factual situation of a failure to return the deposit.<sup>14</sup> In this case because the deposittee is free from dolus he does not incur an obligation. If the discussion concerned the action in ius such a statement would be inappropriate because in that remedy the deposittee incurs an obligation on receipt of the property.<sup>15</sup>

Therefore, D.46.3.81.1 provides clear evidence that the actio depositi in factum was known to Quintus Mucius Scaevola.

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13. See most recently, Litewski, Studien zur Verwahrung im römischen Recht (Warsaw/Krakow, 1978), p.25f and the literature he cites.

14. Gaius, 4.47.

15. See Taubenschlag, Zur Geschichte des Hinterlegungsvertrages im römischen Recht, Grünhuts Zeitschrift 34 (1907) p.683ff at p.698f.

Note that in view of the narrow scope of the action of the XII Tables Quintus Mucius was definitely not referring to this remedy.

As a result its introduction is to be dated to the earlier half of the main period of edictal development which was c. 100-30 B.C.<sup>16</sup> However, if this is the case we must explain the absence of depositum in a list of infaming actions found in the Tabula Heracleensis which is thought to be part of the Lex Iulia Municipalis promulgated by Julius Caesar in 45 B.C.<sup>17</sup>

Tabula Heracleensis, line 110ff: quei furtei quod ipse fecit fecerit, condemnatus pactusve est erit; queive iudicio fiduciae pro socio, tutelae, mandatei, iniuriarum, deve d(olo) m(a)lo condemnatus est erit; ..... 18

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16. See Watson, Law Making in the Later Roman Republic (Oxford, 1974) p.31ff. Burillo, Las Formulas de la actio depositi, SDHI 28 (1962) p.233ff at p.245ff dates the edict for ordinary deposit to roughly the same period (100-80 B.C.). He reaches this conclusion on the basis of dubious inferences to be drawn from the form of individual edicts. His arguments are dealt with in detail as part of the chapter on the edict for depositum.
17. Hardy, Some Problems in Roman History (Oxford, 1924), p.239ff. Doubts have been raised over the character and dating of the Tabula Heracleensis, see Jolowicz and Nicholas, Historical Int. to the study of Roman Law (Cambridge, 1972) p.348 n.5. However, the part of the statute with which we are concerned (lines 110-112) is likely to date from Julius Caesar; see Frederiksen, The Republican Municipal Laws: Errors and Drafts, J.R.S. 1965, p.183ff at p.195f.
18. F.I.R.A. 1 (Riccobono), p.149.

The absence of deposit in the Tabula Heracleensis is mirrored by its absence in the references to infaming actions by Cicero.

Pro A. Caecina, 2.7: ..... qui per tutelam aut societatem aut rem mandatum aut fiduciae fraudavit quempiam, in eo, quo delictum maius est, eo poena est tardior.

Pro R. Comoedo, 6.16 ..... Si qua enim sunt privata iudicia summae existimationis et paene dicam capitis, tria haec sunt, fiduciae, tutelae, societatis.

Pro R. Amerino, 38.111 ..... in privatis rebus si qui rem mandatam non modo malitiosius gessisset sui quaestus aut commodi causa, verum etiam neglegentius, eum maiores summum admisisse dedecus existimabant. Itaque mandati constitutum est iudicium non minus turpe quam furti, credo, propterea quod, quibus in rebus ipsi interesse non possumus, in iis operae nostrae vicaria fides amicorum supponitur; .....

Depositum is, however, mentioned in the list given in D.3.2.1. (Julian 1 ed.).<sup>19</sup>

D.3.2.1. (Julian 1 ed.) ..... qui furti, vi bonorum raptorum, iniuriarum, de dolo malo et fraude suo nomine damnatus pactusve erit: qui pro socio, tutelae, mandati, deposito suo nomine non contrario iudico damnatus erit .....

Also it is mentioned by Gaius where he lists the infaming actions.

Gaius, 5.182. Quibusdam iudiciis damnati ignominiosi fiunt, veluti furti, vi bonorum raptorum, iniuriarum; item, pro socio, fiduciae, tutelae, mandati, depositi.

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19. Strictly speaking this was a list of those people who could not postulare pro alio; Burillo, op.cit., p.250.

On the basis of the non-appearance of deposit in the Tabula Heracleensis Rotondi<sup>20</sup> argues that the action in factum, which he holds to be infaming, was not yet in existence at the time of this statute. Ferrini,<sup>21</sup> on the other hand, believes that the action in factum did exist by this time. In his opinion infamia was a characteristic only of civil law actions, so the absence of deposit he explains by the fact that the actio depositi in ius had yet to be introduced by the time of the statute. It is therefore clear that our first task must be to determine whether the actio depositi in factum was indeed an infaming action. If, as the communis opinio argues, it was an infaming action, the second point to consider is what significance to give to its non-appearance in the Tabula Heracleensis.<sup>22</sup>

Rotondi may be correct in thinking that the action in factum was infaming but his argument to support this view does not stand up to scrutiny. As we have seen<sup>23</sup>, in his opinion,

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20. Scritti 2, p.33ff.

21. Opere 3, p.92.

22. As regards the action of the XII Tables, in no circumstances should we ascribe significance to its absence because it was so narrow in scope.

23. Scritti 2, p.31ff. The matter is discussed in greater detail in the previous chapter.

in Institutes, 4.60, Gaius says that it is laid down by certain earlier jurists (quidam) that plus petitio in the actio depositi, and generally in the infaming actions, resulted in loss of the claim. Gaius, however, distinguishes the effects of plus petitio depending on whether it is made in the actio depositi in factum or the action in ius.<sup>24</sup> Rotondi asks, why did the earlier jurists (quidam) to whom Gaius refers not make this same distinction? The answer, Rotondi argues, is that at the time of the earlier jurists the action in factum was the only action on deposit in existence. Therefore, given the fact that these jurists claimed that plus petitio in the actio depositi, and generally in the infaming actions, resulted in loss of the case, the action in factum must have been infaming.

In the previous chapter we showed that Rotondi's interpretation of this text is mistaken. Watson<sup>25</sup> correctly points out that the earlier jurists to whom Gaius refers were discussing the action in ius, not the action in factum. Does this mean, therefore, that Ferrini is right in believing that infamia was a characteristic only of civil law actions and that the absence of deposit in the Tabula Heracleensis is due to the fact that the action in ius

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24. The text is illegible, see De Zulueta, The Institutes of Gaius 1, p.260. However, that this was Gaius's decision is highly likely given the progression of his argument from Inst., 4.53-60.

25. Op.cit., p.159. These points are dealt with in greater detail in the previous chapter.

had not yet been introduced? Support for this view can possibly be drawn from Cicero's references to the infaming actions. He does not mention deposit and, besides theft, refers only to the bonae fidei iudicia of tutela, societas, mandatum and fiducia.<sup>26</sup> Equally, in D.3.2.1 and Gaius, 4.182 where depositum is mentioned, it appears amongst these bona fide actions, so the references are likely to have been to the action in ius.

While there is no direct evidence that the action in factum was infaming an argument can still be made out that it was. Firstly, infamia was not restricted to civil law actions in principle. This is clearly shown by the example of the actio de dolo of 66 B.C.<sup>27</sup> which, though formulated in factum<sup>28</sup>, was nevertheless infaming.<sup>29</sup> Secondly, we may be able to infer from Gaius, 4.60 that the actio depositi in factum itself was infaming.<sup>30</sup> In this text

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26. The lack of a reference to deposit by Cicero in this context, Rotondi, op.cit., p.35 takes as further evidence that the action in factum was not yet in existence at the time. Cicero, however, does appear to restrict himself to the civil law actions which were infaming. There is no mention, for example, of the actio de dolo. Also, Cicero does not appear to be offering exhaustive lists of the infaming actions.

27. See Watson, Law Making in the Later Roman Republic (Oxford, 1974), p.72ff.

28. Lenel, E.P., p.114ff.

29. D.3.2.1.

30. The discussion which follows is based on the assumption that the references to deposit in D.3.2.1 and Gaius, 4.182 were to the action in ius.

the earlier jurists to whom Gaius refers would certainly have had in mind only the actio depositi in ius.<sup>31</sup> Gaius, however, distinguishes the effects of plus petitio in the actio depositi in factum and the action in ius. Arguably the discussion of both these actions has to be viewed against the background that, at the beginning of the text, the actio depositi is presented as the exemplar of the infaming actions (in actione depositi et denique in ceteris omnibus ex quibus damnatus unusquisque ignominia notatur). Gaius, when referring specifically to the action in factum, in no way qualifies the earlier statement that the actio depositi is infaming, from which the inference may be correct that the action in factum itself was also infaming.

If this action was infaming, why is there no mention of deposit in the Tabula Heracleensis? There are three possible explanations for its absence: (1) it may have been because the action in factum had yet to be introduced; (2) deposit may in fact have been included but not mentioned by name because it was understood to fall within a generic classification found in the statute; or (3) the omission may have been due to an oversight.

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31. See the full discussion of this point in the previous chapter.



Besides the clear evidence from D.46.3.81.1 that the action in factum was known to Quintus Mucius, Rotondi's thesis that this remedy was not yet in existence by the time of the Tabula Heracleensis raises a difficulty concerning the action in duplum of the XII Tables. Rotondi believes that the action in duplum covered all cases of deposits, so why was it not mentioned in the Tabula Heracleensis?<sup>32</sup> He argues that while to begin with the action of the XII Tables was a remedy separate and distinct from the actio furti nec manifesti, by the time of Quintus Mucius the dishonest deposittee was treated as a thief. The actio depositi of the XII Tables must, therefore, be understood as included within the actio furti mentioned in the Tabula Heracleensis.<sup>33</sup> Maschi<sup>34</sup> has pointed out the weakness of this argument. If one accepts that there was an independent action on deposit established by the XII Tables it is highly unlikely that this came to be absorbed by the actio furti.

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32. Scritti 2, p.14ff.

33. Scritti 2, p.15ff and p.37 n.2.

34. La Categoria dei Contratti Reali (Milan, 1973), p.192ff. Note, however, that Maschi accepts Rotondi's argument that the absence of deposit in the Tabula Heracleensis is because the action in factum had yet to be introduced. He does not offer any explanation why the action of the XII Tables was not mentioned, except, of course, he believes that this remedy sanctioned only necessary deposits.



The second possibility is that the action in factum was understood to fall within a generic classification contained in the Tabula Heracleensis. For example, this is precisely the nature of Rotondi's argument when he suggests that the action on deposit of the XII Tables was included in the Tabula under the actio furti. A number of other explanations along these lines have been advanced.<sup>35</sup> The most plausible is the opinion of Asher<sup>36</sup> who is followed by Schulz<sup>37</sup> and Burillo<sup>38</sup> that deposit is covered by the clause deve dolo malo condemnatus est. Condemnation in the actio depositi in factum was, after all, for dolus alone.<sup>39</sup> The difficulty here is that the reference in this clause may simply be to the infaming actio de dolo which we know to have been in existence at the time.<sup>40</sup> Certainly we should note that in the list of infaming actions found in D.3.2.1. the actio de dolo and depositum are mentioned separately which, if the action in factum were infaming, might lead us to expect the same

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35. A survey is given by Rotondi, Scritti 2, p.35f.

36. Die Depositumsklagen des klassischen römischen Rechts, Zeitschrift für zivilrecht und Prozess, N.F.22 (1865), p.266ff at p.304.

37. Classical Roman Law (Oxford, 1961), p.519.

38. Op.cit., p.249ff.

39. Gaius, 4.47 ..... eamque dolo malo ..... redditam non esse.

40. Watson, Law Making, p.72ff.

separate treatment in the Tabula. However, Burillo draws attention to the fact that in the Tabula Heracleensis there is also no mention of the actio vi bonorum raptorum. Condemnation in this action, which is thought to have been introduced in 76 B.C.,<sup>41</sup> was also for dolus.<sup>42</sup> The absence of this remedy from the Tabula is therefore further evidence, argues Burillo, that the clause deve dolo malo condemnatus est does not refer specifically to the actio de dolo, but rather to those actions in which condemnation was for dolus.

The third possible explanation for the absence of deposit from the Tabula Heracleensis is that it was omitted by an oversight.<sup>43</sup> The statute identifies those iudicia turpia condemnation in which was a cause of exclusion from the Senate. The likelihood, therefore, is that the list was intended to be exhaustive. However, an oversight would, in fact, be conceivable because the Tabula was imperfect. Frederiksen<sup>44</sup> has observed that 'between the text of a law as issued from Rome and the bronze table as found, there is the mind of the local engraver, or his absence of it. This is best shown in the Tabula Heracleensis ..... '

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41. Watson, Obligations, p.256.

42. Lenel, E.P., p.391ff.

43. Kaser, R.P.R. 1 (Munich, 1971), p.535 n.11; followed by Gandolfi, Il Deposito, p.86 n.61. The absence from Cicero would have to be explained by assuming that his lists were not exhaustive.

44. Op.cit., p.187.

To conclude: it is difficult to decide what significance to give to the absence of deposit from the Tabula Heracleensis. The action in factum may not have been infaming; if it was it may have been omitted by oversight. Equally it may have been included within the clause deve dolo malo condemnatus est. Certainly there is nothing fundamentally objectionable to any of these hypotheses. However, for our purposes the important point to establish is that its absence from the statute is not a sound argument to support the view that the action in factum had yet to be introduced by 45 B.C. We have clear evidence that this remedy was known to Quintus Mucius Scaevola who died in 82 B.C.

CHAPTER VI

THE EDICT

## THE EDICT

D.16.3.1.1. (Ulp.30 ed.) Praetor ait: Quod neque tumultus neque incendii neque ruinae neque naufragii causa depositum sit, in simplum, earum autem rerum, quae supra comprehensae sunt, in ipsum in duplum, in heredem eius, quod dolo malo eius factum esse dicetur qui mortuus sit, in simplum, quod ipsius, in duplum iudicium dabo.

We see that the edict on deposit, in its present form, introduced four separate remedies: (1) an action in simplum for ordinary deposit; (2) an action in duplum for necessary deposit; (3) an action in simplum against the heir ex dolo defuncti in necessary deposit; and (4) an action in duplum against the heir in necessary deposit where he himself is guilty of the dolus.

In this chapter we will examine the grounds for the widely held opinions<sup>1</sup> either (a) that each of the remedies referred to was originally the subject of a separate edict or (b) that the parts on ordinary (remedy 1) and necessary deposit (remedies 2-4 inclusive) were the subjects of separate edicts. It is assumed by those who advance the above hypotheses that these individual edicts were issued at different times and that the comprehensive edict recorded in D.16.3.1.1 was put together in its present form at a later date.

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1. See the literature given by Litewski, Depositary's Liability in Roman Law, A.G. 1976 p.6 n.10 (as in off-print); also Taubenschlag, Grünhuts Zeitschrift 34 (1907) p.683ff at p.696ff.

Burillo <sup>2</sup> , following Dernburg <sup>3</sup> , believes that one can identify three different stages in the development of the praetorian edict. In the first and oldest stage an individual edict consisted of two parts: a prohibition expressed by ne quis plus the subjunctive, and a sanction given against those who infringed the prohibition. In the second stage of the development the two parts of the first stage are brought together into one, there no longer being an express prohibition but a sanction made dependent on the occurrence of certain facts; this is found stated in the form: si quis ..... fecerit, iudicium dabo. The third and most modern stage of the development maintained the unity of the second stage but replaced the statement of established facts with an allegation of facts. Here we find the word dicetur used in the form: si quis ..... fecisse dicetur, iudicium dabo. The use of dicetur allegedly corresponds to the time when the praetor accepts facts on the declaration of the pursuer. These are facts which he does not examine. In this connection Burillo postulates a change in procedure. At one time the magistrate himself probably tried the case, but, through time, this job was passed over to the iudex. The function of the praetor then became solely that of granting the action which he did on the basis of an allegation of facts (dicetur) which he now no longer examined.

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2. Las Formulas de la actio depositi, SDHI 28 (1962) p.233ff at p.245ff.
  3. Untersuchungen über das Alter der Satzungen der pratorischen Edicts, Festgabe Hefter (1873) p.91ff. This work was unavailable to me. Cf, Kaser, Zum Ediktsstil, Festschrift Schulz 2 (Weimar, 1951) p.21ff at p.33f.

With regard to the first part of the edict on deposit <sup>4</sup> , Burillo argues that the praetor does not examine whether there was a deposit or not - this is a question which the iudex investigates - hence there is a place for dicetur but it is not used. From this Burillo deduces that the first part of the edict on deposit comes from the second stage of edictal development <sup>5</sup> . The last part of the edict containing the word dicetur is a later addition attributable to the third stage of development. Therefore, according to Burillo, the edict on deposit contains two parts; the first he dates to c. 100-80 B.C. and the second to approximately 50 B.C.<sup>6</sup> .

As to the suggestion that dicetur shows a mature stage of development, it has been contended by Watson <sup>7</sup> that its absence from most clauses of the edict on deposit is probably not significant. If its omission is treated as significant the proper conclusion to be drawn, he suggests, is that the edict was issued at a transitional phase when the

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4. There is some confusion over what constitutes the first and second parts of the edict; see n.6 and the later discussion.
  5. He also suggests that the use of the word autem is a characteristic of the second stage, op.cit., p.247 n.38.
  6. In arriving at the date of 50 B.C. Burillo's points of reference are the edicts for the actio vi bonorum raptorum c. 76 B.C. and for the actio de dolo 66 B.C., in both of which the word dicetur appears. One point to note is that it is not entirely clear whether Burillo is arguing that the edict for ordinary deposit was introduced c. 100-80 B.C. and that for necessary deposit c. 50 B.C., or whether it was only the clause giving an action in simplum against the heir in necessary deposit which was a later addition; see Watson, The Law of Obligations in the Later Roman Republic (Oxford, 1965) p.161. This problem is dealt with later in the discussion.
  7. Op. cit., p.161.



use of dicetur was just beginning. If this were so, Watson adds that 'in a case like deposit one would expect not to have mention of an allegation of deposit (quod depositum dicetur) but mention of an allegation of fraud in respect of the deposit (quod dolo malo eius factum esse dicetur). And in the edict on deposit, dicetur occurs only in the clause where fraud is actually mentioned'. Watson therefore argues that in the case of an edict issued at such a transitional stage of development we might first expect to find dicetur used in the context of a statement of wrongdoing, rather than in relation to the fact of deposit itself. Therefore, in his opinion, the use of dicetur does not support the view that this edict was issued in two stages.

Watson is correct in being cautious about the inferences to be drawn from the appearance of dicetur in an edict. In the case of commodatum the edict was probably in existence by 100 B.C.<sup>8</sup> and yet in the form in which it is preserved it contains the word dicetur<sup>9</sup>. Furthermore, even if at one time the appearance of dicetur was significant in the sense suggested by Burillo, the fact is that the wording of individual edicts, between the time of their introduction and the establishment of the form in which we now find them, may have undergone alteration<sup>10</sup>.

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8. Watson, Law Making in the Later Roman Republic (Oxford 1974) p.43f.

9. D.13.6.1pr. (Ulp. 28 ed.) Ait praetor: quod quis commodasse dicetur, de eo iudicium dabo. Here of course the allegation is of the fact of a loan.

10. See Watson, Law Making, p.33f.

Watson was of the opinion that the use of dicetur is of no help in dating any part of the edict on deposit, Daube<sup>11</sup> takes the view that dicetur has little bearing on the dating of any edicts. In his opinion its presence or absence depends, not on the point in time at which the particular edict was promulgated, but on the motives of the praetor who was introducing the remedy. Daube observes that there are two basic edictal forms: one which allows an action on the grounds of established facts and one which gives an action on the basis of facts alleged (dicetur). A statute or senatusconsultum is generally concerned with legislating directly and for that reason it attaches consequences to facts which are assumed to be established; for example, 'if a man has broken another's bone, he shall pay 300 pieces.' The praetors, however, exercised their influences 'by announcing whether and by what steps they would advance some matters and squash others.' The point is that, unlike the statute or senatusconsultum, the praetors did not legislate directly; as Daube puts it, they exercised a power to declare 'which matters might be usefully raised before them and which might not, and it was here that there was room for the growing up of the form putting forward an allegation of facts'.

The next question is, if the form in which the facts are taken as established is appropriate to statutes and senatusconsulta, why is it that both this and the form making

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11. Forms of Roman Legislation (Oxford, 1956) p.30ff whose thesis is approved by Watson, Law Making, p.34.

an allegation of facts appear in the praetorian edict. The answer turns on the intentions of the praetor who introduced the particular edict. Daube shows that where the praetor adopts a legislative attitude the edict will usually appear in the form of facts established which is the form appropriate to sources which purport to be legislating directly <sup>12</sup> .

With regard to the question of the relative ages of these two forms, Daube thinks that they were possibly equally old, though if one were the older he admits that it is likely to have been that which made the action dependent on established facts. However, this does not help us to date individual edicts or clauses thereof because once both forms existed either might be employed. Daube says, 'the latest edict, therefore, might yet show the earliest form; the earliest extant might show the later'. A further consideration, Daube adds, is that quite possibly a magistrate, when setting up his edict, showed what was simply a personal preference for one of the forms over the other.

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12. Daube, op. cit., p.33 also shows that the use of dicetur is particularly common in subsections. Therefore an edict might begin with a statement of established facts but follow this with a statement of alleged facts. The reason why dicetur is used here, according to Daube, is that where 'a complication is considered .... the praetor .... is more conscious of the possibility of argument and counter-argument, of the litigious nature of the submission by one party'. Daube does not consider the case of deposit; however, his suggestions might well explain the edict in D.16.3.1.1. It begins: quod neque tumultus .... causa depositum sit, in simplum (established facts). Dicetur appears in a subsection where the remedy is dependent on an allegation of dolus on the part of the deceased.

Besides the presence of dicetur, Burillo's other argument in support of the thesis that the edict on deposit contains clauses issued at different times is the use of the pronoun ipse which presumes an antecedent not to be found in the text <sup>13</sup>.

Again, it is argued by Watson <sup>14</sup> that what at first sight is admittedly an odd use of ipse in D.16.3.1.1 does not support the thesis that the edict was issued in two stages. The apparent oddity, he suggests, may in fact be illusory. His argument is that the edict on deposit is one of a small group - the others being the edicta de dolo, de his qui deicerint vel effuderint and de sumptibus funerum - 'where the conduct envisaged is, in the main part of the edict, stated completely in the abstract with no mention either of the doer or the person for whom or to whom the act in question is done'. In the edict de dolo malo which runs: quae dolo malo facta esse dicentur, si de his rebus alia actio non erit et iusta causa esse videbitur, intra annum, cum primum experiundi potestas fuerit, iudicium dabo, Watson notes that no mention is made of the person against whom the action is given. The reason is that it is obvious that the action will lie against the person who is guilty of dolus.

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13. See also Litewski, op. cit., p.6 n.10 (as in offprint) who draws attention to D.16.3.18 (Nerat 2 membr.) De eo, quod tumultus ..... causa depositum est, in heredem de dolo mortui actio est pro hereditaria portione .... in ipsum et in solidum ..... Here ipse is used but there has been an earlier reference to the mortuus.

14. Op. cit., p.16lf.

Equally Watson thinks that the same would have occurred in the edict on deposit except that in this case an action is also given against the depositor's heir for different damages. Were this not so there would have been no need for any mention of the person against whom the action was given as clearly it was against the depositor. As it is, however, the depositor must be mentioned, but it is sufficient to say in ipsum.

Watson's argument is basically sound. If the edict were to have extended only as far as the first action in simplum<sup>15</sup> there would have been no need to mention the person against whom that remedy was given; clearly it was against the depositor<sup>16</sup>. A reference to the depositor therefore becomes necessary precisely because of the introduction of an action against the heir. Watson says that the edict refers to the depositor as in ipsum and not as in eum since the person is stressed because of the action in heredem eius. This makes sense. We need only add that arguably there is in fact an antecedent to which ipse refers. In the first part of the edict an action in simplum is given and we are left to understand that it lies against the depositor. The action in duplum to which the ipse corresponds comes later on in the text and lies against the same person as the action in simplum. In relation to the action in simplum we make the

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15. Alternatively if the edict had read as follows: quod neque tumultus neque incendii .... causa depositum sit, in simplum, earum autem rerum, quae supra comprehensae sunt in duplum iudicium dabo.

16. Cf. the edict for commodatum, note 9 above, where there is no mention of the person against whom the action is given.

connection that it lies 'against the depositum', and therefore the later use of in ipsum refers to the person we have already understood to exist in relation to the earlier mentioned action. Consequently there is an antecedent to which ipse refers but one which we have understood to exist as a result of the earlier mention of the action in simplum.

The third argument in support of the view that the edict on deposit is an amalgam of edicts issued at different times is advanced by Longo<sup>17</sup> and Litewski<sup>18</sup>. They regard it as unlikely that the rarer case of necessary deposit would have been dealt with in an edict at the same time (i.e. as early) as ordinary deposit. We have already suggested that the praetorian action in duplum for necessary deposit was derived from the action of the XII Tables<sup>19</sup>. For this reason, when the praetor introduced an action for ordinary deposit the more likely course is that he will have regulated the position of necessary deposit at the same time<sup>20</sup>.

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17. Il Deposito (Milan, 1946) p.56f.

18. Op. cit. p.5 (as in offprint).

19. An hypothesis rejected by the above-mentioned scholars. See also, Wlassak, Rechtshistorische Abhandlungen (Wien, 1965) p.118f who argues that it was the peregrine praetor who issued an edict on ordinary deposit and later an edict on necessary deposit. The urban praetor amalgamated these two edicts when he wished to absorb them into his own album.

20. A further argument that the edict on deposit was issued in two stages is drawn from its negative formulation. See Litewski, op. cit., p.5 (as in offprint). We have already shown in the chapter on the XII Tables that the negative formulation is the means by which ordinary deposit is defined and that this problem of definition occurs whether or not the edict was issued in two stages.



This brings us to a problem which was raised by Watson <sup>21</sup>. When dealing with Burillo's arguments on the development of the edict, in particular with the deductions he makes from the use of dicetur, Watson objects that it is not clear whether Burillo says that the whole institution of necessary deposit was dealt with later than ordinary deposit, or, whether it was only the clause which gives an action in simplum against the heir which was a later addition. Watson observes that in the edict there are in fact three situations relating to necessary deposit and dicetur is used in connection with only one of them - the case of an action brought against the heir for the dolus of the deceased depositor. Therefore, he argues, if the use of dicetur is significant what is shown is that only this clause is an addition. Whether one agrees with Watson or not depends on where one sees the division of the edictal text as lying. Burillo, and indeed Longo and Litewski divide the edict into two parts: the first deals with ordinary deposit and extends as far as the action in simplum in this case; the second comprises the remainder of the text, in ipsum in duplum .... fin, and deals exclusively with necessary deposit. The important point is that if one treats this second part as a unit, the fact that dicetur appears only in connection with a section of it is unimportant because the whole unit must come from a time when dicetur had come into use.

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21. Op. cit., p.161 and n.1.

We have examined the arguments that the edict on deposit was issued in stages and brought together in its present shape at a later date and we must conclude that they are not strong. Yet there is one further argument, to be drawn from the form of the edict, which might still support the proposition. The edict preserved in D.16.3.1.1 is an elegant piece of writing. Particularly noteworthy is the balance of the passage. It is divided into two halves - one which provides remedies against the deposittee and the other remedies against the heir - and the complementary nature of these halves is accentuated by the progression in the measure of damages: in simplum, in duplum/in simplum, in duplum. It is tempting to view such a contrived passage as the product of a person who is consolidating individual edictal provisions. This is because he is far more likely to be concerned with the form of the resulting product than the original legislator for whom, one might suspect, elegance will not have been an important consideration. We have already said that the provisions on ordinary and necessary deposit are likely to have been promulgated at the same time. Therefore, if any part of D.16.3.1.1 is a later addition, it will have been the section providing an action against the heir in cases of necessary deposit <sup>22</sup>. However, even this is unlikely and we best conclude that D.16.3.1.1 was a single edict issued at one time.

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22. See Taubenschlag, *op. cit.*, p.700f and the further arguments - not all convincing - which he makes. Taubenschlag follows Dernburg closely. Clearly Dernburg, whose work was unavailable to me, believes that only the part of the edict concerning the heir was a later addition.



CHAPTER VII

THE DURATION OF THE ACTION IN FACTUM

## THE DURATION OF THE ACTION IN FACTUM

In this chapter we are concerned with determining whether the actio depositi in factum was available only for the year (annual) or whether it lay in perpetuity. There is no direct evidence in the sources on the matter; therefore conclusions which have been reached have relied on the consideration of indirect evidence and conceptions of the nature of the action in factum; viz whether it was a penal or reipersecutory remedy.

The most important source is D.16.3.18 (Nerat. 2 membr.)

D.16.3.18 (Nerat. 2 membr.) De eo, quod tumultus incendii ruinae naufragii causa depositum est, in heredem de dolo mortui actio est pro hereditaria portione et in simplum et intra annum quoque: in ipsum et in solidum et in duplum et in perpetuum datur.

The text discusses the two actions for necessary deposit. We are told that the action against the heir de dolo mortui lies pro hereditaria portione et in simplum et intra annum quoque; and that the action against the depositor himself lies in solidum et in duplum et in perpetuum. It has been argued<sup>1</sup> that the statement that the action de dolo mortui lies intra annum quoque does not show that it was annual but that it lay in simplum even if brought within a year. Longo<sup>2</sup>, however, has pointed out that to interpret the phrase in this

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1. See Longo, Il Deposito (Milan, 1946), p.55. Longo, who does not mention his source, argues against this interpretation.

2. Op.cit., p.55.

way suggests that Neratius was concerned with eliminating any doubt that if brought within the year the action might lie in duplum. Yet, Longo observes that the edict is quite explicit on the point that the action de dolo mortui was always in simplum<sup>3</sup>, so it is difficult to imagine how such a doubt could have arisen. He also notes that the two actions for necessary deposit were being contrasted by Neratius, and that within the scheme of the text intra annum quoque is symmetrical with the in perpetuum of the following action. In perpetuum certainly indicates the duration of the action, hence Longo correctly concludes that this must also be the case with intra annum quoque<sup>4</sup>. Therefore, on the basis of this text, we can reasonably conclude that in the case of necessary deposit the action de dolo mortui was annual whereas the action against the fraudulent depositor himself (in ipsum) was perpetual.

What does this text tell us about the action in factum for ordinary deposit? It is thought by some scholars that the word quoque in the phrase intra annum quoque referred to this action. Karlowa<sup>5</sup> argues that D.16.3.18 used to form part of a wider discussion in which Neratius spoke first of the action for ordinary deposit which he said lay in simplum and intra annum. Thereafter, Neratius discussed the actions for necessary

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3. D.16.3.1.1 (Ulp.30 ed.) .. in heredem eius, quod dolo malo eius factum esse dicetur qui mortuus sit, in simplum ...

4. Thereafter, according to Longo, the action lies for the heir's enrichment (in id quod pervenit)

5. R.RG. 2, p.1313f, also Rotondi, Scritti 2, p.49f and Maschi, La Categoria dei Contratti Reali (Milan, 1973), p.188f.

deposit in the manner recorded in the text. When he says in this case that the action de dolo mortui lies intra annum quoque, according to Karlowa, the quoque refers back to the action in factum for ordinary deposit which Neratius had said to be annual earlier on in the discussion.<sup>6</sup>

On the assumption that Neratius did first discuss the action in factum for ordinary deposit, Karlowa can be certain that the quoque refers to the remedy against the depositor himself because he believes that this action was passively intransmissible<sup>7</sup>. But the evidence suggests that in fact an action ex dolo defuncti did lie against the heir in cases of ordinary deposit<sup>8</sup>. On this basis Taubenschlag<sup>9</sup> makes the observation that because quoque comes from a part of D.16.3.18 which was discussing the liability of the heir in necessary deposit, it is likely that it refers to the liability of the heir

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6. Longo, op.cit., p.55f argues that if the action for necessary deposit is annual, then a fortiori the action in factum for ordinary deposit must also be annual. He therefore suggests that in classical law D.16.3.7.1 (Ulp. 30 ed.) contained a statement to the effect that the action in factum was annual and that this was subsequently suppressed by the compilers who, however, forgot to excise intra annum from D.16.3.18. But there is no evidence to suggest that D.16.3.7.1 ever contained such a statement. Also, Maschi, op.cit., p.189 n.95 has pointed out that it is the action against the heir de dolo mortui which is annual in necessary deposit and that the action against the depositor himself is in fact perpetual.

7. Also the other scholars mentioned in note 5 above.

8. See the discussion of the passive transmissibility of this action.

9. Zur Geschichte des Hinterlegungsvertrages im römischen Recht, Grünhuts Zeitschrift 35 (1908), p.683ff at p.708ff. Taubenschlag believes that unlike necessary deposit where special provision was made in the edict concerning the action's passive transmissibility, in ordinary deposit this was achieved by judicial interpretation.

in the case of ordinary deposit.

A further approach is to assume that the word quoque does not refer outside D.16.3.18, but that Neratius, who was enumerating certain characteristics of the action de dolo mortui, chose to say that it also (quoque) lay intra annum in addition to being in simplum etc.

Certainly, as both Karlowa and Taubenschlag suggest, Neratius in D.16.3.18 may well have been commenting upon the edict, in which case he is likely to have commenced with the action in factum for ordinary deposit. If we do accept that quoque refers back to this discussion - which is by no means certain - possibly the best conclusion to draw, following Taubenschlag, is that the text tells us nothing about the action against the depositor himself in such a case, but that where the action was brought ex dolo defuncti it lay intra annum.

Besides the assumed inferences to be drawn from D.16.3.18, a number of other tests are applied in determining whether the action in factum against the depositor himself in ordinary deposit lay intra annum or in perpetuum. The conclusion reached depends either upon what is conceived to be the nature of the action or upon peculiarities in its history.

The understanding on which quoque in D.16.3.18 was seen by Karlowa, Rotondi and Maschi to refer to the action in factum was that this was a penal remedy, and, according to an opinion of Cassius, praetorian penal actions lay

intra annum<sup>10</sup>. Cassius, however, also says that praetorian reipersecutory actions post annum darentur, (perpetual), and, on this basis Amelotti<sup>11</sup> concludes that the action in factum was perpetual. Further difficulty arises when we apply the criteria established by Gaius for determining the duration of actions. In 4.110 he states the general proposition that civil law actions are perpetual whereas praetorian actions are usually (plerumque) given intra annum<sup>12</sup>. The statement is developed in 4.111 where we are told that praetorian actions are perpetual in circumstances where imitatur ius civile<sup>13</sup>. This is so, for example, in the case of the actio furti manifesti where the praetor merely replaced the capital civil law punishment with a four-fold pecuniary penalty.

It is by reference to these rules of Gaius that Burillo<sup>14</sup> attempts to determine the duration of the action in factum.

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10. D.44.7.35pr. (Paul 1 ed.) In honorariis actionibus sic esse definiendum Cassius ait, ut quae reipersecutionem habeant, hoc etiam post annum darentur, ceterae intra annum. Rotondi, Sc.2, p.49 simply works on the assumption that it is praetorian actions which Cassius says lie intra annum. Maschi, op.cit, p.189f, however, shows that he is wrong to infer this from D.44.7.35pr. because the text states that it was praetorian penal actions which lay for a year.
  11. La Prescrizione delle Azioni in Diritto Romano (Milan, 1958), p.42 n.61 who does not develop his argument.
  12. Gaius, 4.110. Quo loco admonendi sumus eas quidem actiones quae ex lege senatusve consultis proficiscuntur perpetuo solere praetorem accomodare, eas vero quae ex propria ipsius iurisdictione pendent plerumque intra annum dare.
  13. Gaius, 4.111. Aliquando tamen et perpetuo eas dat, scilicet cum imitatur ius legitimum: ..... furti quoque manifesti actio, quamvis ex ipsius praetoris iurisdictione proficiscatur, perpetuo datur; et merito, cum pro capitali poena pecuniaria constituta sit.
  14. Las Formulas de la actio depositi, SDHI 28 (1962), p.233ff at p.254ff.

He also argues from D.16.3.18, but in a different way from Karlowa. The action against the deposit<sup>ee</sup> in necessary deposit is perpetual, and the reason, Burillo suggests, is that this remedy is derived from the civil law action in duplum of the XII Tables. However, the action of the XII Tables was certainly not passively transmissible, so the remedy against the heir de dolo mortui must have been a completely new action introduced by the praetor, which explains why it lies intra annum. According to Burillo, the rules laid down by Gaius therefore account for the duration of the two actions for necessary deposit. By the same token, Burillo argues that as depositum was sanctioned by the XII Tables, the praetor, when he introduced the action in factum for ordinary deposit, was not introducing a completely new remedy; hence this action must also have been perpetual.<sup>15</sup>

The difficulty here is to determine what was a completely new praetorian remedy as opposed to one where imitatur ius civile. Burillo<sup>16</sup>, for example, thinks that the action in duplum of the XII Tables was none other than the actio furti nec manifesti. If this were correct it is hardly possible that the perpetual nature of the praetorian action for ordinary or necessary deposit could be explained on the

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15. In further support of the proposition that the action in factum was perpetual, Burillo, op.cit., p.257 argues that it would be difficult to determine a point from which to calculate the period of a year had it lain intra annum. Cf Maschi, op.cit., p.188.

16. Op.cit., p.240.



basis that they were derived from the action of the XII Tables, because the actions on deposit could not have developed from the theft action. In fact, the action of the XII Tables, we believe, was an independent action on deposit with a narrow scope, and the strong likelihood is that the praetorian action in duplum for necessary deposit was derived from it. This offers a probable explanation for the perpetual nature of the praetorian remedy.<sup>17</sup> Equally, the annual character of the action against the heir de dolo mortui in necessary deposit is best explained on the grounds that it is a completely new praetorian remedy. But, because the action of the XII Tables was so narrow in its scope, the action in factum for ordinary deposit cannot have been based upon it.<sup>18</sup> Therefore, if the action in factum were perpetual this was not for the reason suggested by Burillo.<sup>19</sup>

Positive evidence that the action in factum was indeed perpetual is supplied by Taubenschlag.<sup>20</sup> He refers to two texts,

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17. But see Amelotti, op.cit., p.42 and Litewski, Studien zum sogenannten depositum necessarium, SDHI 43 (1977), p.188ff at p.197 n.37 who argue that this was a completely new praetorian remedy and that its perpetual nature was due to the desire to afford the depositor special protection in the emergency cases.

18. See the discussion in the chapter on the edict and on the action of the XII Tables.

19. Taubenschlag, op.cit., p.707f also believes that this action was perpetual because it was derived from the action of the XII Tables.

20. Op.cit., p.707f.

D.16.3.1.25 (Ulp. 30 ed.) and Paul Sent., 2.12.10.

D.16.3.1.25 (Ulp. 30 ed.) Si rem depositam vendidisti eamque postea redemisti in causam depositi, etiamsi sine dolo malo postea perierit, teneri te depositi, quia semel dolo fecisti, cum venderes.

Coll. 10.7.10 - P.S., 2.12.10. Si rem apud te depositam vendideris eamque redemeris, post perdideris, semel admissio dolo perpetua depositi actione teneberis.

Taubenschlag suggests, reasonably, that the texts can be treated together,<sup>21</sup> and, in addition, that D.16.3.1.25 was from a commentary on the action in factum. If this is the case we have clear evidence from P.S. that the remedy was perpetual. The reason, in that it was not derived from the action of the XII Tables, must have been that the action in factum was reipersecutory in nature. However, we cannot be certain that these texts discussed the action in factum, so we must concede the possibility that it lay intra annum. But, such a characteristic should not be used in support of the view that this was a penal remedy. In the circumstances the fact that it was available only for a year would best be explained on the basis that the action in factum was a completely new remedy introduced by the praetor.

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21. Also, most recently, Litewski, Depositary's Liability in Roman Law, AG 1976, p.18 (as in offprint).

22. Karlowa, op.cit., p.1313. Lenel, Pal. 2, p.614 who, with reservations, suggests that D.16.3.1.25 comes from a part of Ulpian's edictal commentary which concerned the formula in ius.

We conclude that we have no certain evidence as to whether the action in factum was perpetual or whether it lay only for one year.<sup>23</sup> As it was a remedy introduced by the praetor for the first time this might lead one to suppose that it lay only for a year. However, equally, if it was a reipersecutory action<sup>24</sup>, this fact may nevertheless have been seen as sufficient reason for its being given in perpetuity.

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23. In this discussion scholars have applied the rules of Cassius or Gaius to fit their own conceptions of what the duration of the action in factum should have been. This could be avoided if we were sure in what circumstances to apply one set of rules as opposed to the other. A number of attempts to confront this difficulty have been made. For a useful survey, see Amelotti, op.cit., p.27ff. Amelotti himself believes that Gaius tried to set up new criteria to explain the duration of actions precisely because there were so many exceptions to the rules of Cassius. Yet Gaius's own criteria were no more successful than those of Cassius. Also, factors quite distinct from the sets of rules of Cassius and Gaius may have influenced the duration of actions. Amelotti and Litewski, for example, suggest that the perpetuity of the action in duplum for necessary deposit was due to a desire to afford the depositor special protection in that case.

24. A proposition which we support. Note that D.16.3.1.25 and P.S., 2.12.10 referred to above use the verb tenere, not obligare. This suggests that they refer to the action in factum.

CHAPTER VIII

THE ACTIO DEPOSITI IN FACTUM AS A NOXAL ACTION

## THE ACTIO DEPOSITI IN FACTUM AS A NOXAL ACTION

The evidence to suggest that the praetorian actio depositi was a noxal action is allegedly provided by two texts: D.16.3.21 (Paul 60 ed.) and D.16.3.1.18 (Ulpian 30 ed.), both of which, on the arguments of those who support the proposition, state, or once stated, that the actio depositi lies against a slave following manumission on the principle noxia caput sequitur<sup>1</sup>. Our purpose in this chapter is to argue that on the evidence available there is no reason to suggest that the actio depositi in factum was ever a noxal action.

D.16.3.21 (Paul 60 ed.) Si apud filium familias res deposita sit et emancipatus rem teneat, pater nec intra annum de peculio debet conveniri, sed ipse filius. I. Plus Trebatius existimat, etiamsi apud servum depositum sit et manumissus rem teneat, in ipsum dandam actionem, non in dominum, licet ex ceteris causis in manumissum actio non datur.

In D.16.3.21 the question under consideration is that of liability where a deposit has been made with a

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1. The texts referred to contain no express statement to the effect that the actio depositi in factum was a noxal action. It is argued that this is to be explained by the fact that by the time of Justinian there existed only the single contractual bona fide actio depositi. The compilers, in presenting a single treatment of deposit on the basis of this action, suppressed the allegedly penal characteristics of the praetorian actio depositi; see Burillo, Las Formulas de la actio depositi, SDHI 28 (1962) p.233ff at p.278f.

For classical law at least, the view that the actio depositi in factum was a noxal action is not universally held; see Kaser, Quanti Ea Res Est (Munich, 1935) p.69 n.4.

filiusfamilias or slave who has subsequently been emancipated or manumitted. In 21<sup>pr</sup>. Paul states that in such circumstances the paterfamilias ought not to be held liable to an actio de peculio annalis, but that the son himself is to be liable to an [actio depositi]. Then, in 21.1, Paul reproduces an opinion of Trebatius to the effect that in the case where a deposit has been made with a slave, even he is to be held personally liable after manumission and not the dominus.

Rotondi<sup>2</sup>, who is concerned with the case of the slave mentioned by Trebatius in 21.1, argues that liability to the actio depositi in factum is at issue in the text. His reasons are firstly that the actio depositi in ius was not in existence when Trebatius was alive, and secondly that the decision that the slave himself is liable can only really be understood by reference to the penal nature of the action in factum under which the principle delicta et noxae caput sequuntur explains his liability.

Maschi<sup>3</sup>, who follows Rotondi in dating the introduction of the formula in ius sometime in the second half of the first century A.D. agrees that the action in factum is being

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2. Scritti 2, p.52f and 68f.

3. Maschi, La Categoria dei Contratti Reali (Milan, 1973), p.327f, or alternatively, Una Celebre Antinomia in Tema di Deposito, Studi Scherillo 2, p.573ff.

discussed by Trebatius. But not even Paul, Maschi further observes, could have contemplated the application of the action in ius in this instance, for a slave was incapable of contracting a legal obligation and hence it is hardly conceivable that any obligation which he could contract would transform into a civil obligation following manumission. In fact, like Rotondi, Maschi believes that the decision of Trebatius is to be explained by the fact that the action in factum for deposit was penal. Responsibility under this action was for a failure to return the object deposited (G.4.47) and the liability was unaffected by the subsequent manumission of the slave depositee.

For the reasons given by Maschi, it is likely that a possible liability to the actio depositi in factum is at issue in D.16.3.21. However, if we accept that this was a noxal action, we must also accept that the decision of Trebatius to the effect that the slave is himself liable following manumission is in accord with the principle noxia caput sequitur and therefore quite unremarkable. Yet the manner in which the text is formulated suggests the contrary. It is with this point that the Italian scholars have not come to terms - that the decisions in D.16.3.21 (or at least the decision concerning the slave) are in some way out of the ordinary.



Taking D.16.3.21 as a whole, in the principium Paul expressly excludes the liability of the paterfamilias to the actio de peculio annalis following the emancipation of the filius, which suggests that he admits the possibility that the paterfamilias might ordinarily have been precisely held so liable. Note the debet formulation of the decision which has the force of, 'the appropriate action is not (as one might have expected) the actio de peculio but ...'. This therefore is possibly a hint that there were some jurists who would not have agreed with Paul when he granted the actio depositi against the son. Be that as it may, more interesting for our immediate purposes is the formulation of 21.1 which shows that to give the actio depositi against the manumissus was more problematic than allowing it against the emancipatus. The introduction of the opinion of Trebatius by plus, allied to the etiamsi, is a clear indication to this effect. The unusual nature of the decision with regard to the slave is confirmed by the concluding statement, 'licet ..... datur'<sup>4</sup>. Were the text to be explained along the lines suggested by Rotondi or Maschi, not only would the fact that the decisions were noteworthy remain unexplained, but there would be no justification for the different treatment accorded to the son and the slave. Therefore, while liability to the

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4. This sentence is commonly held to be an interpolation; see Index Intp., especially Buckland, The Roman Law of Slavery (Cambridge, 1908), p.698.

actio depositi in factum certainly is at issue in D.16.3.21, the formulation of the text precludes the view that it was a noxal action which, following the principle noxia caput sequitur, lay directly against the emancipatus or manumissus. Also, it is worth observing in relation to the liability of the manumissus that the view expressed above that the grant of the actio depositi against him was unusual is supported by D.16.3.1.18 (Ulpian 30 ed.). In this text we are told that if I deposit something with a slave I cannot bring an actio depositi against him once he has been manumitted. This, therefore, prompts the question; what is the distinguishing feature between D.16.3.1.18 and D.16.3.21?

The only distinguishing feature between D.16.3.1.18 and D.16.3.21 is one of fact: D.16.3.21 concerns liability following emancipation/manumission where the son or slave is still in retention of the object deposited. In both 21pr. and 21.1 there is a repetition of this fact, which, in the absence of indications to the contrary, strongly suggests that this is the point on which these two cases turn. Certainly were the cases not regarded as being special in this respect there would have been no call for the phrase rem teneat, let alone its repetition in each case.<sup>5</sup>

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5. This is the distinguishing feature according to the scholia to the Basilica, but contra, Rotondi, op.cit., p.52.

That the depositum is still in retention of the property is identified as being the essential feature of the problem by Burillo<sup>6</sup>. He argues that as the depositum is in factual control of the property when it is reclaimed, and as it is only following emancipation or manumission that dolus is committed by the failure to return the property, it is logical that the action is given against the emancipatus/manumissus. Burillo, therefore, explains the liability of the depositum by reference to the point in time when the dolus occurs. This view is mirrored by Litewski<sup>7</sup> who also emphasises the point that it was only after emancipation/manumission that there was dolus on the part of the son or slave. For Litewski, the fact that, in contrast with D.16.3.1.18, an action is given exceptionally against the manumissus turns exclusively on the point of fact that in D.16.3.21.1 the dolus occurs after manumission whereas in D.16.3.1.18 it occurs before manumission.

While there is no denying the importance of the fact that the depositum is still in retention of the deposited property, the argument that the decisions of Paul and Trebatius can be fully explained by reference to the point in time when the dolus actually occurred is rebutted by the consideration of the difference in treatment accorded

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6. Op.cit., p.262f.

7. Litewski, Depositary's Liability in Roman Law, A.G. 1976 p.18f. (as in offprint).

to the filius and to the slave. As stated earlier, the grant of the actio depositi appears to have been more problematic against the manumissus than against the emancipatus. This would not have been so were the decisions simply to be explained by the fact that the dolus occurred after each depositee's change of status, at which point in time their legal capacity is similar. Any difference in their respective treatment suggests that the Roman jurists must at least have had an eye to the point in time when the deposit was undertaken, when their legal capacity was quite different.

Therefore, accepting the importance of the fact that the depositee is still holding the object deposited, we must explain why this affects the question of liability in the manner outlined, bearing in mind that at least in the case of the manumissus the decision was exceptional.

Buckland has put forward two possible explanations: firstly he appears to have favoured the view that 'the decision of Trebatius, established as it was in pre-classical days fails to distinguish between contract and quasi-contract in obligation re contracta'<sup>8</sup>. He argues that, 'if the obligation is regarded as resting not on any agreement, but on the mere holding of the property, it is easy to see

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8. Slavery, p.698.

that Trebatius may well have regarded the liability as continuing'. To the fact that the text itself sees the rule as exceptional Buckland adds that the concluding words, licet ... non datur cannot be ascribed either to Trebatius or to Paul.

There is, however, no good reason to think that this concluding statement does not come from Paul; furthermore, as we have seen, there are other indications in the text as to the unusual nature of the decision. It could of course be argued that it is only for Paul that the opinion of Trebatius is unusual. Yet this in turn would suggest a difference of approach between him and Trebatius which does not seem to be warranted from the text. We would have to accept that Paul took a decision of Trebatius, which had been made on the grounds suggested by Buckland, and used it to support a decision of his own relating to a filiusfamilias which was made on quite different grounds - this is unlikely given the character of the text.

More recently, Buckland in the context of a discussion of capitis deminutio, favoured another view which he developed in two stages.<sup>9</sup> Starting with the filius, he argues that D.16.3.21.pr.; D.17.1.61; D.17.2.58.2; and D.27.3.4.1,11 'are all cases in which the minutus

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9. Buckland, Textbook of Roman Law, 3rd ed. p.140 n.9.

continues performance of the contract, etc., after the minutio, and they show ... that in such a case the thing must be treated as a whole'. With regard to the position of slaves, he treats these cases relating to the filius as 'closely analogous to the case of continued administration by a manumitted slave in which a similar rule is laid down by some jurists'. Therefore, arguing by analogy from the case of the filius, Buckland explains the liability of the emancipatus in D.16.3.21.1 on the similar ground that 'he is continuing performance of a contract begun as a slave and that this is one of the cases in which the negotium must be treated as a whole'.

To look first of all at the position of the filius; of the texts referred to by Buckland in conjunction with D.16.3.21, D.17.1.61 is of particular interest.

D.17.1.61 (Paul 2 Nerat.) Quod filio familias ut peteret mandavi, emancipatus exegit: de peculio intra annum utiliter agam. Paulus: sed et cum filio agendum est.

The text concerns an undertaking of a filiusfamilias, performance of which is effected after his emancipation, and, as a result of which we can assume he must be holding property or money which he should hand over to the mandator. The factual situation being discussed here is therefore not significantly different from the case of deposit considered in D.16.3.21..

We see that Neratius was of the opinion that the correct course of action in these circumstances was to proceed by the actio de peculio against the paterfamilias. Such an approach is unexceptional if, as is likely, Neratius was basing his decision on the fact that the mandate was given when the emancipatus was alieni iuris. As he looked to the time when the negotium was initiated, this, for him, was a case of a transaction entered into by a family subordinate for which the ordinary remedy was an actio de peculio against the paterfamilias. If this interpretation is correct, the character of his decision would support the suggestion made earlier in relation to the case of deposit that when Paul denied the actio de peculio against the paterfamilias there may at least have been some jurists who would not have agreed with him.

Paul, on the other hand, as in the deposit case, prefers direct recourse against the emancipatus. Although the text gives the appearance of having been severely truncated it is reasonable to assume that it still contains the essential facts of the matter under consideration. These are (1) that a mandate is given to a filiusfamilias and (2) that the mandate is, or continues to be, performed by the filius after he has been emancipated. It was clearly the second of these which was the determining factor for Paul - this is because, not only do we have to give effect to the emancipatus exegit, but also it is hardly conceivable that Paul would have differed from



Neratius had the whole affair been concluded when the filius was alieni iuris. So, as between Paul and Neratius the difference of approach is essentially one of emphasis: Neratius looked to the point of initiation of the mandate whereas Paul took into account when it was actually performed.

The text therefore establishes that where a filius concluded a mandate which continued to be performed after his emancipation, some jurists, as shown by the decision of Neratius, saw the appropriate remedy as being an actio de peculio against the paterfamilias, while others like Paul preferred recourse directly against the emancipatus.

Returning to D.16.3.21.pr., a filius undertakes a deposit which he still holds following emancipation. Applying the same reasoning, the inference to be drawn is that Paul argues for recourse directly against the deposittee precisely because he is still holding the deposit, and hence the obligation to restore the property has not been fulfilled when he is emancipated. Some jurists may, however, have emphasised the fact that the obligation was incurred when the filius was alieni iuris, and hence that as far as they were concerned the appropriate remedy was de peculio, which would explain why Paul feels it necessary expressly to deny recourse against the paterfamilias.

At this point we should bring a greater degree of precision to bear on one point, namely Paul's statement in D.17.1.61 that 'et cum filio agendum est'. That is, Paul advances recourse against the emancipatus as an additional remedy to the actio de neculio against the paterfamilias. On the other hand in D.16.3.21.pr. the actio depositi is the only remedy available.

The matter is not essential to our argument, but the difference is possibly to be explained by the fact that in the case of deposit the obligation was simply for return of the property which the emancipatus had failed to do. As he was actually holding the object concerned when he was emancipated there was effectively no further liability (as seen by Paul) which related to the period when he was in potestas, and for this reason, albeit that the deposit was undertaken when the filius was alieni iuris, he denied recourse against the paterfamilias. In the mandate, on the other hand, the matter may not have been so cut and dried, in so far as there may have been claims arising from the mandate referable to the period prior to emancipation.

Turning now to the case of the slave considered in D.16.3.21.1, the facts are the same, except that to allow recourse directly against the manumissus is more problematic than allowing it against the emancipatus. Watson has remarked that it is 'a complete mystery why, contrary to

the general rule, a contractual action is given against a libertus for a contract made during slavery'.<sup>10</sup> However, as we are given no reason to believe to the contrary, the motives for the decision must be the same as those found in relation to the son. The further complication, however, was that slaves had no legal capacity; both at civil and praetorian law we are told that they pro nullis habentur. We have seen that for the Roman jurists the time when the deposit was undertaken was certainly an important consideration. The problem, therefore, was that a manumissus was being made personally liable for an obligation which was undertaken at a time when he was quite simply incapable of being legally bound. However, it was clearly felt by at least some jurists that the special facts of the case justified an actio depositi against him rather than any recourse against the dominus.

To conclude our observations on D.16.3.21, we have argued that an actio depositi is given against the filius because he is still in retention of the deposit following his emancipation. The fact that this decision may have been regarded as unusual by some jurists is suggested, not only by the fact that Neratius, in a case of mandate, allowed recourse only against the father, but also by the fact that Paul thought it necessary expressly to refuse the

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10. The Law of Obligations in the Later Roman Republic (Oxford, 1965) p.164. The modern communis opinio would of course question the view that this action could be called contractual.

actio de peculio annalis against him. Therefore, on this level the decision preserved in 21pr. may have been noteworthy. Even more noteworthy however was the decision relating to the manumissus as he was incapable of incurring a legally enforceable obligation when he undertook the deposit. The special nature of this decision is reflected in the language of the text and confirmed by the concluding statement licet ... datur.

What is not tenable is the interpretation advanced by Rotondi and Maschi. Not only do they overlook the significance of the phrase rem teneat but their explanation compels us to regard the text in a very different way. In particular, the statement, in ipsum dandam actionem, non in dominum, must be taken as once having meant that the actio depositi lies against the slave (on the principle nox caput sequitur) and not as a noxal action directly against the dominus. This is an attractive interpretation, but one which is inconsistent with the form of the text. D.16.3.21 as a whole was clearly fashioned by Paul. In 21pr. the two actions being considered are the actio depositi against the son and the actio de peculio annalis against the paterfamilias. Therefore in 21.1 - in the absence of indications to the contrary - the inference must be that non in dominum still refers to the question of

the liability of the paterfamilias to the actio de peculio.<sup>11</sup>

The alternatives being offered in each half of the text are therefore the same. Furthermore, to suggest that Trebatius was dealing with a noxal action means that we must accept that Paul was supporting his decision with regard to the filius with another decision which, although it produced the same result in practice, was made on quite different grounds. No particular purpose would seem to be served by such an approach, and, in any event, it is not consistent with the fact, already stated, that the decision with regard to the libertus was clearly exceptional and regarded as such by both Paul and Trebatius.<sup>12</sup>

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11. The text is taken from that part of a book, Quemadmodum a bonorum emotore vel contra eum agere, which deals with the actio Rutiliana, Lenel, Pal., I, p.1077. The case of the emancipatus is assimilated by Lenel to that of a debtor who still retains a deposit after bonorum venditio, the action lying against him and not against the bonorum emptor; op.cit., p.1077 n.2. The palingenesia is only understandable on the assumption of a possible liability of the paterf. to an actio de peculio. While this was clearly the case for Paul, there is no reason to believe that it was not for Trebatius also.

12. See Pernice, Parerga 3, ZSS 9 p.229 n.10 who argues that the decision of Trebatius can only be understood on the grounds of a desire to free the paterf. from liability. One might indeed question whether Trebatius, or for that matter even Paul, would have rationalised their decisions along the lines suggested by Buckland. Possibly the two jurists saw no basis in principle for their decisions, beyond the fact that on the particular facts there was greater logic in recourse directly against the deposittee than against the paterf. The fact that the decisions were clearly contentious might support this conclusion. Also for a criticism of his views put forward in Textbook of Roman Law, see Buckland, Slavery, p.697f; viz. 'The mere continuing to hold a thing is a very different matter from continuing to look after business relations'.

Finally we come to the status of the concluding statement of the text, licet ... datur. We have not relied upon it in the foregoing argument because it is often regarded as being a compilatorial addition. Watson is probably correct in suggesting that it should not be ascribed to Trebatius.<sup>13</sup> However, the statement confirms what we know from other indications to have been an exceptional decision with regard to the manumissus. It is therefore in no way inconsistent with the rest of the text. Also the construction, licet followed by the indicative by itself is an insufficient ground for holding that these words come from any other than Paul.

We now turn to a consideration of our second text.

D.16.3.1.18 (Ulpian 30 ed.) Si apud servum deposuero et cum manumisso agam, Marcellus ait nec tenere actionem, quamvis solemus dicere doli etiam in servitute commissi teneri quem debere, quia et delicta et noxae caput sequuntur: erit igitur ad alias actiones competentes decurrendum.

As in relation to D.16.3.21 (Paul 60 ed.), Rotondi argues that the formula in factum is being considered here.<sup>14</sup> He notes that were the contractual formula in ius the object of the discussion, the statement of Marcellus that the actio depositi does not lie against the manumitted slave would be in accordance with principle and hence

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13. Op.cit., p.164.

14. Op.cit., p.52f.

there would have been no necessity for the addition of quamvis .... sequuntur.<sup>15</sup>

As Rotondi regards the actio depositi in factum as having been a noxal action, it is no surprise that he further argues that the opinion of Marcellus, quoted here by Ulpian, was in the original quite in agreement with that of Trebatius found in D.16.3.21.1 - that is that where a deposit is made with a slave, the actio depositi in factum lies against him following manumission on the basis of the principle noxia caput sequitur. Therefore, Rotondi argues that while the compilers have preserved intact the opinion in D.16.3.21, they have turned the similar statement of Marcellus on its head by the insertion of a nec, thereby transforming a decision which was originally positive into the negative one now found in the Digest.<sup>16</sup> Then, having effected this change, it becomes clear that the quamvis introducing the subordinate clause is out of place because the explanation solemus ... sequuntur now no longer fits in with the positive decision, the sense being that the action lies in spite of the principle noxia caput sequitur. Rotondi, therefore, maintains that the quamvis is a substitute for quoniam which originally stood in the classical text. Confirmation for this, he suggests, may

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15. Op.cit., p.52 n.1.

16. This interpretation is followed by Albertario, Studi 3, p.165 and Burillo, op.cit., p.263f.



be provided by the fact that the quamvis is followed by the indicative which is possible evidence of corruption. Finally the erit .... decurrendum appearing at the end of the text, Rotondi attributes to Tribonian.

The approach of Maschi is very different to that of Rotondi.<sup>17</sup> His argument is that contemporary criticism of D.16.3.21 and D.16.3.1.18 has failed to take into account developments in the institution of deposit between the time of Trebatius, when the appropriate action was only in factum, and the time of Marcellus, when there was also a formula in ius. Therefore, as far as Maschi is concerned, D.16.3.1.18 is dealing with the actio depositi in ius, which Marcellus says does not lie against a slave following manumission.<sup>18</sup> In contrast to the action in factum, as Maschi sees it, the actio depositi in ius is a civil law contractual action, and as a slave was most certainly not capable of contracting a civil law obligation, the fact that Marcellus denies recourse against the libertus by this means is quite in accord with principle. Maschi, therefore, argues that the initial part of the text -

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17. La Categoria, p.327f.

18. See also, Burillo, op.cit., p.287.

including the nec - is genuine, the remainder, however, he regards as having been subject to alteration.<sup>19</sup>

While in no way wishing to take issue with the fact that were Marcellus referring to the actio depositi in ius he would have denied recourse against the manumissus, we must nevertheless test what is essentially an assumption on Maschi's part that the text was in fact dealing with the civil law action. Maschi himself admits that in the time of Marcellus and Ulpian there was both an actio depositi in factum and an actio depositi in ius. It clearly does not follow, therefore, that just because in the time of Trebatius there was only the praetorian action that

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19. Firstly he suggests that the form of the Digest text is Justinianic, but that this is reflective of the form of the original decision of Marcellus. So because the Digest text ends on a positive note by allowing recourse to alias actiones, Marcellus must have concluded on a positive note with something on the lines of, 'the action in factum will lie'. This has now been replaced by 'erit .... decurrendum'. The reason for the substitution, according to Maschi, was that while Marcellus was concerned with illustrating the diverse regimes of the two formulae for deposit, the importance of this difference had ceased to exist by the time of Justinian. For him 'basta il rilievo che, se non si puo agire in un modo (con l'a. in ius come diceva Marcello) si puo agire altrimenti (come mostra l'anodino actiones competentes)'. So if one views both D.16.3.21 and D.16.3.1.18 in terms of Justinian's legislation, Maschi concludes that there is no contradiction between them. Utilising D.16.3.21 the compilers have affirmed that one can proceed against the manumitted slave in cases of deposit. Equally this is the effect of D.16.3.1.18, argues Maschi, for although the compilers have made use of a negative decision of Marcellus concerning the f. in ius, they do in fact transform the text into a positive decision by means of the interpolation erit .... decurrendum. Much of this theory seems highly questionable.

Marcellus must necessarily have been discussing the action in ius. That is to say, that, while indeed there may have been development in the institution of deposit between the time of Trebatius and Marcellus, in the time of the latter jurist both deposit actions existed. Hence we must at least admit the possibility that Marcellus was referring to the action in factum.

This possibility becomes more compelling when we take account of the fact that the text comes from a part of Ulpian's edictal commentary which purports to deal with the action in factum.<sup>20</sup> It is perhaps arguable that this is not conclusive, but if we look at the texts to either side of l.18 the argument becomes more forceful. For example, D.16.3.1.16 treats the return of a deposit in a deteriorated condition as quasi non reddita, which is clearly a juristic extension of the formula in factum. Also the text concludes with the words, potest dici dolo malo redditam non esse, following the wording of the same formula.<sup>21</sup> Equally D.16.3.1.19, which gives the actio depositi to the bonorum possessor and to the person who has received an hereditas under the rules of the

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20. Lenel, Pal. 2, p.613f. Contra Lenel, concerning the order of treatment of the action in factum and the action in ius in the edictal commentary; Gandolfi, Il Deposito (Milan, 1976) p.72 and p.84f. But see also Taubenschlag, Zur Geschichte des Hinterlegungsvertrages in römischen Recht, in Grünhut's Zeitschrift 35 (1908) p.129f. at p.130f.

21. D.16.3.1.16 (Ulp. 30 ed.) Si res deposita deterior reddatur, quasi non reddita agi depositi potest : cum enim deterior redditur, potest dici dolo malo redditam non esse. Cf, Gaius, 4.47.

S/C Trebellianum, is dealing with the f. in factum.<sup>22</sup>

Therefore, the texts to either side of D.16.3.1.18 deal with the praetorian action. Undoubtedly Ulpian's treatment of each of the two formulae was systematic - the one following the other - and as the compilers certainly have not rearranged the order of the extract from Ulpian 30 ad edictum,<sup>23</sup> there must be a very strong presumption indeed that D.16.3.1.18 itself is also concerned with the formula in factum. Furthermore, there is also force in the point made by Rotondi that were Marcellus referring to the f. in ius, there would have been no need for the qualification quamvis ... sequuntur.<sup>24</sup> Maschi, however, as we have said, suggests that this part of the text has been altered, and therefore he would write it off as completely Justinianic.<sup>25</sup> But, as we shall see, there is no good reason to substantiate such a view.

We now turn to a consideration of Rotondi's argument concerning the text. As we saw earlier, he maintains that

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22. G.4.34. indicates that a civil law action will only lie to the bonorum possessor by means of a fiction; and G.2.253 that the praetor gives actiones utiles following the introduction of the S/C Trebellianum to the person who has received the hereditas under a fideicommissum.

23. See Evans-Jones, The Prefatory Section of D.16.3 Depositi vel contra., RIDA 1978 p.247f.

24. Op.cit., p.53 n.1.

25. Studi Scherillo, p.577; though he does not give his reasons. However, see note 19 above.

Marcellus was discussing the formula in factum and that originally Marcellus said that the action did lie against the manumitted slave on the grounds of nox caput sequitur. The compilers, however, have reversed this decision by the insertion of the nec in the text. Therefore, on Rotondi's thesis, the compilers started with two texts in agreement: they altered D.16.3.1.18 but left the opinion of Trebatius found in 21.1 intact, distinguishing it, and for that reason not altering it also, on the grounds that the manumissus was still in retention of the deposit.

The purpose of Rotondi's suggested emendation of 1.18 is to bring the opinion of Marcellus into agreement with that of Trebatius. We have, however, already shown that his analysis of D.16.3.21.1 is mistaken: the 'rem teneat' was most certainly of crucial significance to Paul who fashioned the text, and as he was using the opinion of Trebatius to support his own decision relative to the filius, the inference must be that the 'rem teneat', appearing as it does in both halves of the text, was also of relevance to Trebatius. Therefore, the fact that the deposit was still in retention of the deposit was the distinguishing feature of the case for these jurists and did not become so simply at the hands of the compilers.

Furthermore, there do not appear to be sufficiently strong grounds to suggest alteration of the text to support Rotondi's thesis. As we have said, he himself suggests

only that in addition to the insertion of the nec, the compilers substituted quamvis for a quoniam which stood in the original classical text.<sup>26</sup> That quamvis is followed by the indicative does not however confirm this contention, for while quamvis regularly takes the subjunctive it is also not unknown with the indicative in classical writings and its use in this way is possible by as late a jurist as Ulpian.<sup>27</sup>

A more far-reaching criticism of the text is, however, levelled by Burillo.<sup>28</sup> He follows Rotondi in thinking that Marcellus once gave a positive decision in this case on the grounds of noxæ caput sequitur, but unlike Rotondi he regards most of the text as having been subject to manipulation. He points firstly to the seeming contradiction in the statement that if I bring an action (cum manumisso agam) Marcellus says that an action does not lie (Marcellus ait nec tenere actionem). However, we can translate - agam - along the lines, 'I set about bringing an action', in which case there is no contradiction in this part of the text.

Secondly Burillo argues that the phrase 'teneri quem debere' is odd because of the use of both debere and tenere, two verbs indicating that the individual is liable where

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26. Op.cit., p.53.

27. See Hofmann-Szantyr, Lateinische Syntax und Stilistik (Munich, 1965) p.604.

28. Op.cit., p.263 n.69.

one would have sufficed (el que debe ya queda obligado sin necesidad de decirlo). The alleged duplication is, however, explained when consideration is given to the particular point being made by Ulpian. Marcellus is quoted as saying that the action on deposit does not lie; hence the libertus is not liable for the dolus he committed as a slave. This position is, however, opposed in the text to what was regarded as being the normal rule that an individual ought (debere) to be held liable (teneri) for dolus committed even in slavery. The use of the ought in this instance implies precisely the exception to the rule; so we customarily say that a person ought to be liable for dolus committed even during slavery (on the grounds of noxam caput sequitur) but this is not so in the case of deposit.

Two further objections are raised by Burillo against the present state of the text from quamvis .... sequuntur. He remarks on the use of the first person plural in the verb solemus,<sup>29</sup> and on the repetition found in the phrase et delicta et noxae,<sup>30</sup> but neither of these, it is submitted, are sufficiently grave to support the argument for interpolation. We must therefore treat the text as being substantially genuine<sup>31</sup> and as a clear statement to

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29. The first person plural is used by Ulpian precisely because of the generality of the rule to which he is referring.

30. But cf. Albertario, op.cit., p.166.

31. Erit .... decurrendum is likely to be an addition.



the effect that, contrary to the rule that liability for dolus survives manumission in cases where the principle nox caput sequitur is applicable, it is not so in the actio depositi in factum, albeit that the condemnation in this action is in fact for dolus alone. Focusing on the question of dolus, the point of the text is precisely to distinguish the actio depositi in factum from those cases where liability for dolus survives a change in status; nox caput sequitur is a characteristic of these latter actions but not of the praetorian action on deposit.

This concludes our examination of D.16.3.21 and D.16.1.18.<sup>32</sup> We have argued that these two texts do not provide evidence to substantiate the view that the actio depositi in factum was a noxal action either in classical or earlier law. D.16.3.21pr. does allow an actio depositi against a filius but this is clearly as an alternative to an actio de peculio against the paterfamilias.<sup>33</sup> Equally, as this

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32. See also D.16.3.1.42 (Ulpian 30 ed.) Were it only the son or slave who had been guilty of dolus, Burillo, op.cit., p.264 argues that the paterf. had the choice between paying the value or giving up the son or slave in noxae deditio. According to Burillo this is not stated here because the penal regime of the action in factum has been disappearing. In view of the foregoing discussion it is suggested that there is no sound basis for this interpretation. Cf. also Taubenschlag, op.cit., p.130 concerning D.16.3.1.18 (Ulp. 30 ed.).

33. Apart from the texts already mentioned see D.16.3.27 (Paul 7 responsorum). The liability of the paterfamilias in cases of deposits made with his familia appears always to have been de peculio.

text was brought together by Paul, and as the opinion of Trebatius was clearly regarded as exceptional, the alternative remedies against the slave must have been the same as those against the son. The fact that recourse is allowed against the deposit<sub>ee</sub> at all is due to the fact that in both cases he was still holding the property when he was emancipated or manumitted. This suggests that where the deposit<sub>ee</sub> was not holding the property at that time, an actio depositi would not lie, which is precisely what Marcellus says in D.16.3.1.18 when dealing with the case of a deposit made with a slave.

CHAPTER IX

A PLURALITY OF DEPOSITEES

## A PLURALITY OF DEPOSITEES

In this chapter we are concerned with the question of liability where a deposit is made jointly with more than one depositee. There is a great deal of dispute over the treatment found in the texts and it is helpful, by way of introduction, to give a brief statement of the terminology and concepts which we will meet in the following discussion.

We are concerned with the concept of solidary liability. A difficulty, however, is that the word 'solidary' can be used in a number of different ways. Firstly we can talk of solidarity where several people were liable to a penalty for a joint delict. Thus, to use the example given by Buckland<sup>1</sup>, if two persons engaged in a theft, each was liable for the whole penalty. In this case each wrongdoer was liable for the whole amount, and, as their liabilities were independent, they continued to be so liable even although one of the others had paid. To be distinguished from this form is the solidarity which existed where 'each of the two or more persons was liable or entitled to the whole, but it was due only once, so if the sum was once paid the whole was ended'<sup>2</sup>. However, within this particular class of solidarity, there are a further two sub-divisions to be made. In the first group, to which the name correality is applied, for classical law, the bringing of an action by, or against, one of the

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1. Textbook of Roman Law, 3rd ed., p.452.

2. Buckland, op.cit., p.453.

parties, barred or released the others. The reason for this was that litis contestatio between one of the creditors and one of the debtors destroyed the obligation. Later this position was changed when Justinian enacted that where there was a plurality of debtors, litis contestatio against one would not release the others, but only full satisfaction.<sup>3</sup> On the other hand, in the second group of solidary obligations, to which the name simple solidarity is applied, both for classical and Justinianic law, only full satisfaction ended the obligation.<sup>4</sup>

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3. C.8.40.28. See Buckland, op.cit., p.454; also Liebs, Die Klagenkonkurrenz im römischen Recht (Göttingen, 1972), p.38ff, who points out that Justinian refers only to certain cases of a plurality of debtors, albeit those which in classical law were the main instances in which correality applied; namely joint obligations arising from stipulation.
  4. On the origins and theory of the terms correality/ simple solidarity, see Kerr Wylie, Solidarity and Correality (Edinburgh, 1923), p.1ff. The problem is also found expressed in terms of concurrence of actions; for example, by Kaser, R.P.R.1 (Munich, 1971), p.655ff who follows Levy, Die Konkurrenz der Aktionen und Personen im klassischen römischen Recht (Berlin, 1918). In the general class of solidary liability the action of a plurality of creditors, or the actions against a plurality of debtors, were actions over the same matter in dispute (de eadem re). As a result, on litis contestatio in one of the actions, not only was this action consumed, but in fact all the actions of the remaining creditors, or the actions against the remaining debtors, were barred. This exclusion effect means that the respective actions stood in a relation of what, by German scholars, is called Konsumptionskonkurrenz. Against this background there was, however, an important development. As early as classical law, suggests Kaser, in the case of the bonae fidei iudicia, the obligations of a plurality of debtors inter-se were not regarded as de eadem re. The effect of this was that the remaining debtors were not released simply on litis contestatio with the first debtor, but only on satisfaction of the creditor. Here it is said that the actions stood in a relation of Solutionskonkurrenz. Kaser further argues that when Justinian introduced the general Solutionskonkurrenz he failed to amend a large number of classical texts which as a result still show evidence of Konsumptionskonkurrenz.

As regards depositum there are two issues upon which we have to decide. In the first instance we must determine whether a deposit made jointly gave rise to solidary liability. The answer to this question is in the affirmative. Secondly we must decide whether the joint depositors stood in a relation of correality or simple solidarity in classical law. It is the answer to this second question which has given rise to the dispute in the literature. On the basis of D.45.2.9pr., which traditionally, but mistakenly, is thought to have referred to the actio depositi in ius, we shall argue that the action in factum gave rise to correality. As regards the action in ius the likelihood is that the position was the same, except that towards the end of the classical period, in common with the other bonae fidei iudicia, it came to apply a regime of simple solidarity. The evidence for this proposition is provided by D.16.3.1.43 (Ulpian 30 ed.)

D.45.2.9pr. (Papinian 27 Quaest.) Eandem rem apud duos pariter deposui utriusque fidem in solidum secutus, vel eandem rem duobus similiter commodavi: fiunt duo rei promittendi, quia non tantum verbis stipulationis, sed et ceteris contractibus, veluti emptione venditione, locatione conductione, deposito, commodato testamento, ut puta si pluribus heredibus institutis testator dixit: Titius et Maevius Sempronio decem dato.

At the beginning of the text we are told that when an object is deposited by someone with two people whose fides he relies upon in solidum, the depositors become joint debtors (fiunt duo rei promittendi). A problem relates to the use of the word promittendi which, it has been argued,

suggests that a stipulation was made for the return of the deposit. This is the stance taken by Perozzi<sup>5</sup> and Sacconi<sup>6</sup>; the latter scholar further arguing that as the obligation of the depositors is clothed in a stipulation the text offers no information on the position of a plurality of depositors where there is no such special agreement. For reasons developed principally by Albertario<sup>7</sup> this interpretation is not generally followed.

Levy<sup>8</sup> offers two possible explanations for promittendi: he suggests firstly that the word itself is interpolated, or at least that the compilers have suppressed a quodammodo or quasi in the phrase which originally read, quasi (quodammodo) duo rei promittendi. The significance of the inclusion of the word quasi/quodammodo is that there is no longer a suggestion of a stipulation; stipulation simply being advanced by Papinian as the main source of solidarity to which, on this argument, the case of deposit is assimilated<sup>9</sup>. That promittendi was interpolated is also held by Albertario<sup>10</sup>, who, while not

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5. Istituzioni di Diritto Romano 2 (Rome, 1928), p.138 n.7.
  6. Studi sulle Obligazioni Solidali da Contratto in Diritto Romano (Milan, 1973), p.68ff.
  7. Le Obligazioni Solidali (Milan, 1948), p.57f; Studi di Diritto Romano 6 (Milan, 1953), p.331f. Also, Riccobono, Scritti di Diritto Romano 2 (Palermo, 1964) p.455 n.7.
  8. Op.cit., p.204ff.
  9. Cf. D.13.6.5.15; D.13.5.16pr.
  10. Studi, p.331ff and p.407ff.



accepting the possibility of a stipulation in this particular case, admits that for classical law the expression duo rei promittendi denoted only debtors liable in solidum as a result of a stipulation. At this time the description of debtors liable in solidum as a result of entering other negotia was accomplished by the phrase duo rei, or alternatively quodammodo duo rei or quasi duo rei. According to Albertario it was only in the time of Justinian that we find debtors liable in solidum, whatever the negotium from which their solidarity resulted, referred to as duo rei promittendi. This view is followed by Litewski<sup>11</sup> who thinks that Papinian would not have used the expression in this wide sense. Therefore he also regards promittendi as interpolated.

Yet this use of duo rei promittendi in the general sense of debtors liable in solidum whatever the source of obligation as genuine for classical law is precisely the second alternative advanced by Levy<sup>12</sup>. This interpretation is accepted by Kerr Wylie<sup>13</sup>, Thomas<sup>14</sup> and Liebs<sup>15</sup>, though it

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11. Studien zur Verwahrung im römischen Recht (Warsaw/Krakov, 1978), p.6 n.4.

12. Op.cit., p.205f; though he only advanced this interpretation as a possibility.

13. Op.cit., p.267.

14. Duo rei locationis in solidum esse possunt, I Museum Londiniense Philologum, p.79ff.

15. Op.cit., p.39 n.4.

should be pointed out, following Kerr Wylie, that used in this sense the phrase, prima facie, must signify correal debtors<sup>16</sup>.

Besides his doubts concerning duo rei promittendi, Levy also believes that the statement vel eandem rem duobus similiter commodavi, and the end section of the text, quia ... fin, are Byzantine additions. He takes D.45.2.9pr. with 9.1 and reconstructs the former as follows<sup>17</sup>:

Eandem rem apud duos pariter deposui utriusque fidem in solidum secutus: fiunt duo rei. sed si quis paciscatur, ut ab altero culpa quoque praestaretur, verius est non esse duos reos, a quibus impar suscepta est obligatio.

This is an attractive reconstruction. However, before commenting upon it we must first examine the problems raised by the phrase utriusque fidem in solidum secutus. The question raised by this phrase is: does it refer to a stipulation or special agreement whereby solidarity was created or does it not?

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16. For classical law stipulation was the main source of correal liability; Buckland, Textbook, p.453; Liebs, op.cit., p.38. This forces Litewski op.cit., p.6 n.4, who argued that deposit gave rise to simple solidarity in classical law, to hold that the word promittendi is interpolated.

17. Op.cit., p.206.

Sacconi<sup>18</sup>, who believes that the obligation of the depositors was created by stipulation in this case nevertheless appears to be uncommitted on the significance of the phrase. He suggests rather that the initial part of the text has been abbreviated by the compilers and that a concrete reference to the stipulation has been dropped. On the other hand Perozzi<sup>19</sup> and Albertario<sup>20</sup>, in one of his earlier works, see utriusque fidem in solidum secutus as referring directly to a stipulation.

This position is similar to that of Binder<sup>21</sup> who believes that a special agreement had been made for the creation of solidarity. He concedes that the phrase might indeed be interpreted as meaning that the solidarity is a natural result of pariter deponere, but this interpretation he decides is confounded by the word similiter which shows that in solidum fidem sequi was not the result, but a modality of deponere. Binder arrives at this conclusion by arguing from the drawing together, in the second half of the text, of sale and hire with deposit and commodatum. In the former two cases, in normal circumstances, liability was pro parte, but in this instance we are told that liability is solidary.

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18. Op.cit., p.69 n.48.

19. Op.cit., p.138 n.1.

20. Variazioni di Responsabilità nell'actio depositi derivanti da Patto, BIDR 25 (1912), p.24.

21. Die Korrealobligationen im römischen und im heutigen Recht (Leipzig, 1899), p.367.

This can have come about only by special agreement. The word similiter is taken to refer to utriusque fidem in solidum secutus which denotes the special agreement, and, in addition, it is taken to refer to all the contracts such as sale and hire mentioned in the second half of the text. Linguistically, in fact, similiter relates only to the first mention of commodatum, but presumably - Binder's argument is very elliptically expressed - he relates it also to sale and hire precisely because there has been a deviation from what he believes to have been the normal position of liability pro parte in these cases.

This interpretation is unsound for a number of reasons: firstly there is the likelihood that vel eandem rem duobus similiter commodavi is a compilatorial addition<sup>22</sup>. More importantly, similiter without doubt refers back to pariter and not to utriusque fidem in solidum secutus, and also it clearly relates only to the first mentioned commodatum. Furthermore, certainly by the time of Papinian, liability in sale and hire, in the absence of special agreement, was solidary and not pro parte, precisely as is stated in this text<sup>23</sup>.

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22. Index Intp; also Litewski, op.cit., p.6.

23. By classical law the bonae fidei iudicia gave rise to simple solidarity; see most recently Liebs, op.cit., p.184ff; cf, Thomas, op.cit., p.79f.

A further explanation of the meaning of utriusque fidem in solidum secutus is offered by Albertario in one of his later works<sup>24</sup>. He says that the phrase, 'è chiaramente allusiva all'esistenza di un semplice contratto reale, perchè il fidem sequi è termine caratteristico per designare questo contratto'. Again, however, there are obvious objections to this interpretation: fidem sequi may be found on occasion in the context of the real contracts, but it is certainly not a characteristic term for denoting such a contract<sup>25</sup>. Even if it were, its use in this instance would be tautologous because there has already been prior mention of the contract and the circumstances in which it was made in the phrase pariter deponere. Also, in fact, to regard utriusque fidem in solidum secutus in the way suggested by Albertario is to rob it of the real function which it does have in the text<sup>26</sup>.

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24. Le Obligazioni Solidali, p.57. The handing over of property to be returned at a later date which is a common feature of the real contracts is sometimes referred to in the terms alienam fidem sequi. It is also argued that this concept underlies the edictal category de rebus creditis which contains all the real contracts except depositum which was placed with the bonae fidei iudicia once the formula in ius was introduced. On this point, see Rotondi, Scritti 2 (Milan, 1922), p.42f. For a discussion of fidem sequi in the context of the real contracts, see Maschi, La Categoria dei Contratti Reali (Milan, 1973) p.100ff. Cf, D'Ors, Creditum und Contractus, ZSS 74 (1957) p.73ff.

25. For an extensive study of the use of the phrase, see Feenstra, Fidem Emptoris Sequi, Studi Ugo Enrico Paoli (Florence, 1956) p.273ff.

26. See post.

We now come to the dominant view concerning the interpretation of the phrase. This is put forward by Levy<sup>27</sup> and followed, inter alia, by Kerr Wylie<sup>28</sup>, Rotondi<sup>29</sup>, Archi<sup>30</sup>, Feenstra<sup>31</sup> and most recently by Litewski<sup>32</sup>. To quote Litewski who follows Levy closely, the words utriusque fidem in solidum secutus, 'weisen allein auf die Richtung des Vertrauens und des Willens des Glaubigers hin, was in dem Depositumsakt implicite enthalten, und nicht daneben explicite verträglich vorbehalten ist'.

A distinction is therefore made between what is implicit and explicit within the contract, the function of the phrase allegedly being simply to indicate that solidarity belongs to the naturalia of a deposit. This means that where a deposit is made jointly with two persons, the creditor's intention to hold each liable for the whole will be implied in the absence of agreement to the contrary<sup>33</sup>.

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27. Op.cit., p.208.

28. Op.cit., p.268.

29. Scritti 2, p.113 n.4 at p.114.

30. La Funzione del Rapporto Obligatorio Solidale, SDHI 8 (1942) p.193ff at p.233ff.

31. Op.cit., p.280f.

32. Op.cit., p.6f.

33. Kerr Wylie, op.cit., p.268f.

However, it is arguable that this does not provide an adequate explanation for the appearance of utriusque fidem in solidum secutus in the text. If indeed solidarity is a natural consequence of a deposit made jointly with a plurality of depositors why should we find a phrase referring to the depositor's intention of holding these two parties liable in solidum? By way of contrast we need only look at D.16.3.1.43 (Ulp. 30 ed.) where no such statement is found<sup>34</sup>. This would suggest either that the phrase is superfluous, especially in view of pariter which indicates the joint nature of the deposit from which the solidarity should naturally result<sup>35</sup>, or precisely the existence of the stipulation which the above scholars wish to deny; a point supported by the appearance of the word promittendi which prima facie is suggestive of stipulation. In addition we should take account of the palinogenesia of the text: according to Lenel<sup>36</sup> the whole of D.45.2.9 (Papinian 27 Quaest.) is found under the rubric de stipulationibus. To emphasise this point Sacconi<sup>37</sup> refers us particularly to 9.2 where we are expressly told that the duo rei promittendi are liable under a stipulation. Also

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34. See post.

35. See Sacconi, op.cit., p.69 n.48.

36. Pal. 1, p.869.

37. Op.cit., p.69, though, as stated, Sacconi appears to be uncommitted on the significance of the actual phrase utriusque fidem in solidum secutus itself.



with reference to 9.1 he notes that the text is concerned with a simple deposit made with two people, accompanied by a pactum de culpa praestanda with one of the depositors. In this context Sacconi<sup>38</sup> quotes with approval Perozzi's observations on the text: 'nel 9.1 paciscatur o sta per stipuletur o è itp. in luogo di questa parola; che si trattasse di stipulazione risulta dal promissent successivo. Il 9.2 conferma che tutto il discorso doveva vertere sopra casi di stipulazione'.

Having reviewed the opinions expressed upon the phrase utriusque fidem in solidum secutus and the objections which can be raised against each, we shall now argue that Levy's interpretation is essentially correct, except that it is necessary to develop his argument with a view to answering two questions: (1) if solidarity is implicit in the contract why is there explicit mention of the fact that the depositors are liable in solidum? (2) how do we explain Papinian's choice of language; it would certainly have been open to him, if not more likely for him, simply to state that where I deposit with two persons jointly they are liable in solidum, so why does he employ the fidem sequi phrase?

The reason for the express mention that the depositors are liable in solidum, even where solidary liability would have been implied from the mere act of depositing jointly with

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38. Op.cit., p.69 n.47.

two people anyway, can be understood by setting 9pr. in its context. The remainder of this extract from Papinian discusses the effect of particular agreements on the legal position of a plurality of debtors, the question being answered is, are these people duo rei as a result of this agreement or are they not? (Duo rei for the moment we can take as signifying those correally bound.) So, in D.45.2.9.1, two situations are considered: firstly where I make a deposit with two persons but conclude a pactum de culpa praestanda with one of them it was decided that the parties were not duo rei; in the second case, however, where I conclude such a pact with both depositors but one of them is later released from this additional liability, they remain duo rei.

Therefore, presented in 9pr. is the normal consequence of a joint deposit. In so far as the following text deals with variations of that position by agreement it was clearly incumbent upon Papinian to make explicit what the normal position was; hence the utriusque fidem in solidum secutus phrase which indicates that the co-depositors are solidarily liable.

Accepting the fact that the phrase does not refer to a special agreement for the creation of solidarity, we must now ask why this solidarity is expressed in terms of fides? The first possible consideration is that in deposit there is an implicit act of faith, because, by the very fact of

giving over his property, the depositor puts his trust in the depositee<sup>39</sup>. This is expressed, for example, by Ulpian in D.16.3.1.4 where he refers to the depositor as quis fidem elegit. Similarly in D.45.2.9pr. the depositor could be said to entrust his property to the faith of the two depositees in solidum. However, there is in fact a preferable explanation. The real motive for the fidem sequi terminology must be the contrast which is made here with the situation discussed in D.45.2.9.1. In the latter case there is no reliance simply on the fides of the two depositees with the consequence of their liability only for dolus which this implies, but rather the depositor concludes special agreements with each, making either one or both of them liable for culpa over and above their basic contractual responsibility. The element of fides appears in 9pr. precisely because of the contrast with 9.1 where the depositor demands special undertakings by the depositees; the fides mentioned in 9pr. emphasises that the depositor relies on the basic contractual position without entering into special agreements whereby this is altered in his favour.

Support for this line of argument is found by looking at the use of the fidem sequi phrase elsewhere<sup>40</sup>. In

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39. Cf., Albanese, Per La Storia del Creditum, Annali Palermo 32 (1971) p.39ff.

40. See Feenstra, op.cit., p.273ff.

D.36.2.26.1 (Papinian 9 resp.), for example, the phrase is used, again by Papinian, to contrast the trust placed in an individual with the position where security is demanded of him; sed fideiussores ab eo non petendos, cuius fidem sequi defunctus maluit. Similarly the phrase fidem emptoris sequi<sup>41</sup> deals with the case where the seller puts his trust in the buyer by letting him have the goods without first demanding the price or security for the price.

Therefore, the sum total of the arguments relating to utriusque fidem in solidum secutus confirms that it does not refer to a stipulation or special agreement whereby solidarity was created. Rather, it is the means by which Papinian indicates that no separate agreement has been concluded with the depositors whereby their normal solidary liability resulting from pariter deponere has been altered in any way. In addition, Litewski<sup>42</sup> rightly observes, making a comparison of 9pr. with 9.1, that as the latter text deals with the problem of the liability, as a result of pact, of joint-depositors for culpa, had in fact the pr. dealt with a special provision for the creation of solidarity we might have expected to find the terms pactum or pacisci used there also.

Next we consider the word pariter which has given rise to certain difficulties. There are two interpretations as to

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41. Justinian, Inst., 2.1.41.

42. Op.cit., p.7 n.4.

what it signifies. Albertario<sup>43</sup> offers the more straightforward view that it denotes the unity of the act of depositing with a plurality of deposites necessary for the creation of solidarity<sup>44</sup>. There is, however, a group of scholars<sup>45</sup> who, on the basis of their observations of D.45.2.9.1. and 9.2, give to the word a greater significance. In these texts they point to the phrases, inpar suscepta est obligatio and in parem causam suscipiunt, and argue that pariter must signify, not merely the joint nature of the deposit, but an equality of obligation on the part of the two deposites as a result of that joint deposit<sup>46</sup>. This is a possible interpretation, but in 9pr. the point of equality of obligation is already conveyed by utriusque fidem in solidum secutus<sup>47</sup>. Furthermore, 9.1 and 9.2 deal specifically with cases where there is, or may be, deviation from the equality of obligation situation and hence a more explicit statement of the legal position is required in these particular instances. Therefore, the opinion of Albertario is to be approved. Certainly there is no good reason to think that pariter is a post-classical addition as has been suggested by

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43. Le Obligazioni Solidali, p.36ff.

44. Like the word simul found in the context of commodatum in D.13.6.5.15 (Ulp. 28 ed.) Si duobus vehiculum commodatum sit vel locatum simul ...

45. See Litewski, op.cit., p.7 n.9 and the authors whom he cites.

46. See Litewski, op.cit., p.7 n.10 and the literature he cites.

47. But contra, Sacconi, op.cit., p.69 n.48.

Siber<sup>48</sup> on the grounds that it, or something similar, is not found in D.16.3.1.43<sup>49</sup>.

With regard to the concluding section of the text, quia non tantum verbis stipulationis ... fin, objections are developed in greatest detail by Albertario<sup>50</sup>. These are as follows: (1) there is no congruity between verba stipulationis and ceteri contractus; it exists only between stipulatio and ceteri contractus; (2) the section contains no verb; (3) the expression ceteri contractus is found in late or interpolated sources<sup>51</sup>; (4) there is a petitio principii in the statement that one is liable in solidum in deposit because deposit also gives rise to solidary liability; and (5) testamentum is clumsily classified among the ceteri contractus. As a result of these objections Albertario, as, for example, also Levy<sup>52</sup>, excises completely this last section of the text. Less severe is the position of Riccobono<sup>53</sup> who believes that only the part, sed et ceteris contractibus, veluti

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48. Römisches Recht in Grundzügen für die Vorlesung 2 (Berlin, 1928), p.291.

49. See Litewski, op.cit., p.7 n.10.

50. Studi 6, p.331ff. For the earlier literature, Levy, op.cit., p.204 n.3.

51. Also Riccobono, op.cit., p.453ff.

52. Op.cit., p.206. See also, Beseler, Studi Bonfante 2 (Milan, 1930), p.74ff.

53. Op.cit., p.455.

emptione venditione, locatione conductione is added. This, he thinks, is due to the compilers, because of his belief that for classical law correality in the consensual contracts was not possible in the absence of stipulation. A middle view between these two is adopted by Kerr Wylie<sup>54</sup> who retains the words quia non tantum verbis stipulationis but removes the remainder of the section. Finally, Thomas<sup>55</sup> believes that the section originally read as follows: fiunt enim duo rei promittendi non tantum verbis stipulationis sed et emptione venditione, locatione conductione, deposito, commodato ac etiam testamento. It was therefore a later hand, though not the compilers, he contends, which introduced, (1) the generalisation implied in ceteris contractibus and (2) the word veluti to show that the statement was not exhaustive. The latter addition was necessary to explain the fact that, for example, mandate was not mentioned in the list.

As a preliminary observation we should note that the text is from Papinian's twenty-seventh book of quaestiones which dealt specifically with de duobus reis constituendis under the edictal rubric, de stipulationibus<sup>56</sup>. The appearance of deposit in this context is to be explained by the facility with which it could be used to illustrate problems

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54. Op.cit., p.269ff.

55. Op.cit., p.7 (as in offprint).

56. Lenel, Pal. 1, p.869.



related to duo rei [promittendi]<sup>57</sup> and because joint depositors, like joint debtors in stipulation, were correally bound in classical law (9pr.)<sup>58</sup>. A depositor was liable only for dolus but might, by pact, undertake additional liability for culpa. In 9.1 <sup>are</sup> is shown the circumstances in which joint depositors who concluded such pacts were, or were not, duo rei. This whole discussion on depositum is clearly intended as an analogy with the position of joint liability in stipulation<sup>59</sup> to which the discussion reverts in 9.2.

The palingenesia of the text speaks for the genuineness of the phrase, quia non tantum verbis stipulationis. In a work concerned generally with stipulation we might reasonably expect it to be presented as the exemplar of the type of obligation under consideration. If this phrase is genuine we can further infer that in the original Papinian proceeded to list examples of other transactions which gave rise to solidary liability. Such is the inference to be drawn from non tantum. However, the remainder of the text has certainly been subject to manipulation. Particularly noteworthy is the absence of a verb after quia and the classification of testamentum amongst the ceteri contractus. The generalisation, ceteris contractibus is universally

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57. Cf, Kerr Wylie, op.cit., p.286.

58. See post.

59. Cf, Litewski, op.cit., p.8 n.12a; contra, Sacconi, op.cit., p.68f.

regarded as corrupt, but it does not necessarily follow that everything after that is an addition. The determination by scholars of what is genuine has turned on their ideas of which of the named transactions gave rise to solidary liability in classical law. For example, Riccobono excludes sale and hire on the grounds that in the absence of stipulation they gave rise to liability pro parte but Thomas retains them. Thomas was concerned only with establishing that hire gave rise to solidary liability; he steered clear of the problem of the existence or not of correality and simple solidarity in classical law<sup>60</sup>. But this difficulty has to be confronted before we can decide which parts of the text after ceteris contractibus are genuine because it has become increasingly accepted that in classical law the bonae fidei iudicia gave rise to simple solidarity<sup>61</sup>. Yet, D.45.2.9pr. appears originally to have had correality in mind.

The idea that the text originally concerned correality is fostered principally by the fact that stipulation is presented as the exemplar of the form of obligation under discussion (fiunt duo rei promittendi quia non tantum

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60. Op.cit., p.1 (as in offprint).

61. Kaser, R.P.R. 1, p.655f; Liebs, op.cit., p.184ff and Litewski, Litis Contestatio et Obligations Solidaires, RHD 54 (1976) p.149 who offers a full citation of the literature; see further the discussion of D.16.3.1.43, post.

verbis stipulationis ...). And, in classical law, stipulation was the main source of correality<sup>62</sup>. Also, the example of testamentum is instructive. Papinian says, ut puta si pluribus heredibus institutis testator dixit: Titius et Maevius Sempronio decem dato. This statement should be taken with the following text from Pomponius.

D.30.8.1 (Pomp. 2 Sab.) Si ita scriptum sit, Lucius Titius heres meus aut Maevius heres meus decem Seio dato, cum utro velit Seius aget, ut si cum uno actum sit [et solutum] alter liberetur, quasi si duo rei promittendi in solidum obligati fuissent ...

Liebs<sup>63</sup> confirms what has long been regarded as the interpolation of et solutum. Therefore the heirs were correally liable in this case in classical law. However, there is a possibly important difference between D.45.2.9pr. (Papinian) and Pomponius in this respect. Papinian says Titius et Maevius, not Titius aut Maevius. Nevertheless, either we should read aut instead of et<sup>64</sup> or we must assume that the intention in 9pr. was that the decem be paid only once. If this were not so the illustration would be out of place both for classical (correality) and Justinianic law (simple solidarity). It is highly unlikely that in 9pr. the example of the heirs was introduced by the compilers, not only because of the

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62. See note 3, ante.

63. Op.cit., p.66f.

64. Cf, Kerr Wylie, op.cit., p.270.

fact that the former in classical law were correally liable, but also because of the detailed nature of the illustration.

If D.45.2.9pr. originally concerned correalty, we must conclude that, according to Papinian, a joint deposit with a plurality of depositors gave rise to correal liability. Deposit, after all, is the main object of discussion in the text. Therefore, in spite of Albertario's objection mentioned earlier we should accept the inclusion as genuine of depositum, and probably, by analogy<sup>65</sup>, commodatum in the list alongside testamentum. This leaves sale and hire. On the assumption that the view that the bonae fidei iudicia gave rise to simple solidarity in late classical law is correct, these two contracts must have been added by the compilers<sup>66</sup>. Certainly they could not have stood alongside testamentum and stipulation which patently gave rise to correalty in classical law. Once Justinian finally did away with the cases of correalty remaining in his own day, it is quite understandable that he should generalise the last part of 9pr. by the addition of the statement, ceteris

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65. See post.

66. Litewski, RHD, p.149ff does not deal specifically with sale and hire. However at p.175 he argues that simple solidarity will have operated in all the bonae fidei iudicia. Even if these two contracts gave rise to liability pro parte in classical law they cannot have appeared in this discussion alongside stipulation, depositum and testamentum which gave rise to solidarity.

contractibus, veluti emptione venditione locatione conductione. This explains how testamentum came to be classified amongst the ceteri contractus.

As regards the phrase, duo rei promittendi, the compilers have suppressed the word quasi. The purpose of this emendation was to rob stipulation of its position as the exemplar of the form of liability under discussion. The compilers intended the phrase to be used in the general sense of joint debtors liable in solidum. However, as it is, the alteration is hardly satisfactory because, in view of non tantum verbis stipulationis, stipulation still appears in the text as the model source of solidarity.

Finally we must decide on the status of the phrase vel eandem rem duobus similiter commodavi. Although we have argued that commodatum originally appeared in the list of transactions at the end of the text, the common view that the phrase at the beginning is an addition<sup>67</sup> is correct. We have seen that deposit appeared in their work on stipulation because of the way in which it could be utilised to illustrate problems related to duo rei. The suitability of deposit was due to the fact that the basic contractual liability for dolus alone could be varied by pact. This was not the case in commodatum, at least as regards the question of liability for dolus. More

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67. Index Intp.

importantly, in D.45.2.9.1 only depositum is discussed which would be odd had 9pr., where the discussion originated, concerned both deposit and commodatum equally. The problem which is then raised is why should commodatum, and indeed testamentum, be mentioned at all at the end of 9pr. They appear simply to reinforce the fact that other transactions, like stipulation, gave rise to correality when Papinian was writing and this confirms the suitability of the use of one of them (deposit) as an analogy with the position of joint debtors in stipulation.

At the beginning of the chapter we recorded Levy's reconstruction of 9pr. We are now in the position to comment upon this. The main point on which we differ is the severity with which Levy attacks the present form of the text. As an alternative we suggest that it originally read:

Eandem rem apud duos pariter deposui utriusque fidem in solidum secutus. fiunt quasi duo rei promittendi quia non tantum verbis stipulationis <?> sed et deposito, commodato, testamento, ut puta si pluribus heredibus institutis testator dixit: Titius aut Maevius Sempromio decem dato.<sup>68</sup>

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68. Or possibly: fiunt duo rei promittendi non tantum verbis stipulationis sed et deposito, commodato ... etc. where duo rei promittendi signifies those correally bound.

Therefore, the only part of 9pr. which is corrupt is the generalisation: ceteris contractibus, veluti emptione venditione, locatione conductione.

But, if we exclude sale and hire, why should we not remove the references to deposit and commodatum which also gave rise to bona fide actions<sup>69</sup>, and therefore possibly simple solidarity, in classical law? The answer lies in the fact that at the time these transactions had both an action in factum and a bona fide action in ius<sup>70</sup>. Papinian was referring to the regime of the actiones in factum. This idea is supported by the following considerations: stipulation is presented as the exemplar of solidarity (i.e. correality) in the text (non tantum verbis stipulationis). Stipulation might give rise to a condictio or to an analogous actio ex stipulatu. Equally the actio ex testamento available to the legatee, Sempronius, is a strictum iudicium not dissimilar from the condictio<sup>71</sup>. Also the actio commodati in factum has long been regarded as having similarities with the condictio, often being

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69. As regards commodatum, although it had a formula in ius, whether this was bona fide is disputed; Kaser, R.P.R. 1 (1971), p.534.

70. Gaius, 4.47.

71. Though not exactly the same; Lenel, E.P., p.367.



referred to as 'die kondiktionenähnliche formula in factum'<sup>72</sup>. The actio depositi in factum, of course, is generally regarded as a penal remedy and, therefore, quite different. However, its formula differs from that of the praetorian actio commodati only in so far as it contains a reference to dolus<sup>73</sup>. Furthermore, it is worth noting that in D.16.3.12.3, when Pomponius draws an analogy between the actio depositi in factum and other iudicia stricta as regards periculum after litis contestatio, as examples of these iudicia he refers precisely to the actio ex stipulatu and actio ex testamento<sup>74</sup>. If these actions are closely associated in a discussion of that nature it supports the idea that they would be associated in a discussion of solidarity. Certainly this is far more likely than the common view that Papinian, in the context of the stricti iuris remedies arising from stipulation was discussing the bona fide actio depositi in ius<sup>75</sup>, especially as the evidence we have suggests that this remedy gave rise to simple solidarity in classical law<sup>76</sup>.

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72. Kaser, Q.E.R.E. (Munich, 1935), p.65 and the literature he cites; Id., R.P.R. 1 (1971) p.627; also D'Ors, Creditum und Contractus, ZSS 74 (1957) p.73ff.

73. See Watson, The Law of Obligations in the Later Roman Republic (Oxford, 1965), p.167.

74. D.12.3.3 (Pomp. 22 Sab.) Quemadmodum quod ex stipulatu vel ex testamento dari oporteat, post iudicium acceptum cum detrimento rei periret, sic depositum quoque eo die, quo depositi actum sit, periculo eius apud quem depositum fuerit est, si iudicii accipiendi tempore potuit id reddere reus nec reddidit.

75. Most recently, Litewski, Studien, p.6f.

76. See the discussion of D.16.3.1.43 post.

One possible objection to the suggestion that D.45.2.9pr. originally concerned the actio depositi in factum turns on the idea that pacts whereby the standard of liability of the deposittee could be varied were inadmissible in this remedy. However, clear evidence that such pacts were admissible in classical law in the actio depositi is provided by D.16.3.1.6 which certainly referred to the action in factum<sup>77</sup>:

D.16.3.1.6 (Ulp. 30 ed.) Si convenit, ut in deposito et culpa praestetur, rata est conventio ...

Therefore we can conclude that D.45.2.9pr. provides strong evidence that as far as Papinian was concerned joint deposittees sanctioned by the action in factum were correally liable.

Our next source is D.16.3.1.43.

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77. Lenel, Pal. 2, p.613 and note 1; E.P., p.288 n.7. Contra, esp. Albertario, BIDR 25, p.15ff, who argues against the views of, (1) Segrè that pacts were admissible in classical law in both the action in factum and the action in ius and (2) Rotondi who believes that they were admissible only in the action in ius. Albertario himself thinks that all references giving effect to pacts in this context were Justinianic. Most recently on this question see, Maschi, La Categoria dei Contratti Reali (Milan, 1973) p.309ff and Gandolfi, Il Deposito (Milan, 1976) p.38 and p.142ff.

D.16.3.1.43 (Ulp. 30 ed.) Si apud duos sit deposita res, adversus unumquemque eorum agi poterit nec liberabitur alter, si cum altero agatur: non enim electione, sed solutione liberantur. Proinde si ambo dolo fecerunt et alter quod interest praestiterit, alter non convenietur exemplo duorum tutorum: quod si alter vel nihil vel minus facere possit, ad alium pervenietur: idemque et si alter dolo non fecerit et idcirco sit absolutus, nam ad alium pervenietur.

The text has been interpreted in three different ways:

(1) it concerns the action in ius and before being changed by the compilers it said that joint depositors were correally liable; (2) it concerns the action in ius and shows that in late classical law simple solidarity was applied in this bona fide remedy; and thirdly, it concerned the action in factum and before being altered by the compilers stated that joint depositors were cumulatively liable; that is, each could be sued independently for the whole value of the deposit and one was not released even although the other had paid in full. We take these views in turn.

Levy<sup>78</sup> focuses firstly upon the opening statement of the text that where property is deposited with two people, adversus unumquemque eorum agi poterit. Contained within this statement, he suggests, is the idea that it was a normal consequence and not a special application (i.e. as the result of stipulation) of the solidary principle that in such cases each depositor assumed liability in solidum. This is substantiated by our observations of D.45.2.9pr.

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78. Op.cit., p.208.

and on this particular point Levy is generally approved.<sup>79</sup>

Then, on the basis of his belief that correality operated in deposit in classical law, Levy, following Eisele<sup>80</sup> in large part, proceeds to number his objections to the text which in its present form presents solutio as the only means by which a co-depositee could be released in the time of Ulpian. His objections to the text are as follows:

(1) in the clause, non enim electione, sed solutione liberantur, he points to the use of the word electio in the sense of litis contestatio and to the fact that the verb liberantur has no real subject as evidence that this piece is Justinianic; (2) the interpolation of the above mentioned clause establishes the interpolation of the word nec: this is because once one has removed the statement concerning solutio, for Levy it must follow that a regime of correality existed in its place. He believes that in classical law where issue was joined with one of the co-depositees the other was released; the word nec must therefore be replaced by sed; (3) quod interest

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79. See further, Archi, op.cit., p.234; Kerr Wylie, op.cit., p.260f and Litewski, Studien, p.6, who observes that were this a special application of the solidary principle Ulpian would certainly have mentioned the fact. Contra, Albertario, Oblig. Solidali, p.106 who, founding upon his interpretation of D.45.2.9pr., suggests the addition of the words in solidum, thus making the opening of the text run: si apud duos in solidum sit deposita res. But cf. Litewski, op.cit., p.6 n.4. Note that solidarity must have been a normal consequence of a joint deposit both under the action in factum and action in ius (D.16.3.1.43).

80. Archiv für die civilistische Praxis 77 (1891), p.448f which was unavailable to me.

praestiterit; the objection here concerns the mood of the verb; (4) quod si ... fin; following Eisele, Levy points firstly to the superfluous nam, to the allegedly false facere possit, to the repetition of perveniri ad and to the double incongruity in alter ... alius. There is a double incongruity here because, not only is there a switch from alter to alius, but this occurs twice. As reconstructed by Levy, the classical text would therefore read as follows:

Si apud duos sit depositares, adversus unumquemque eorum agi poterit: <sed> liberabitur alter, si cum altero agatur. Proinde <et> si ambo dolo fecerunt et alter <iudicium accepit>, alter non convenietur exemplo duorum tutorum. <?>.

Further comment is required on Levy's insertion of et between proinde and si ambo. His reason is that the et emphasises the fact that litis contestatio with one of the co-depositees released the others even if ambo dolo fecerunt. It is precisely this point of emphasis which Levy considers Ulpian would have made in the original text.<sup>81</sup> Besides these points Levy is uncommitted as to whether anything followed exemplo duorum tutorum and what its substance might have been. The essence of his emendations, therefore, is that in a classical text which purports to present solutio as the only act which

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81. But cf, Kerr Wylie, op.cit., p.262.

extinguished the obligations of the co-depositees he substitutes a regime of correality whereby litis contestatio with one of the defenders released the others. This interpretation advanced by Levy has been widely followed by scholars who, though they may differ from him on certain points of detail, nevertheless accept his basic conclusion.<sup>82</sup>

A highly detailed refutation of the above approach is provided by Litewski<sup>83</sup> who convincingly shows that the text is mostly genuine.<sup>84</sup> Rather than reproduce all his

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82. For example, Kerr Wylie, op.cit., p.260f who accepts that the denial of correality and affirmation of simple solidarity is certainly Justinianic. He follows Levy on the restoration of sed instead of nec in preference to an et suggested by Eisele, op.cit., p.449. However, besides offering a much fuller reconstruction (p.260 n.1-4) than Levy, he differs from him on a couple of points: (1) instead of the iudicium accepit proposed by Levy he suggests fuerit conventus or the like; (2) he does not accept the insertion by Levy of et between proinde and si ambo. Whether or not anything stood in the classical text after exemplo duorum tutorum, it is agreed by both scholars that the phrase et idcirco sit absolutus is Byzantine. This phrase raises the question of what Kerr Wylie op.cit., p.262f refers to as the 'extensive responsibility of correal debtors'. Cf. Levy, op.cit., p.210 n.5.

On the general point of those who follow Levy on the application of correality to deposit in classical law, see especially, Kaser, Q.E.R.E. p.73f; Archi, op.cit., p.230f and Albertario, Oblig. Solidali, p.106f. A full citation of the literature and consideration of objections not mentioned here is provided by Litewski, RHD 54 (1976) p.155ff.

83. RHD 54, p.155f, only nam ad alium pervenietur appearing at the very end of the text he regards as corrupt (p.158); see also, Id. Studien zur Verwahrung, p.5f.

84. Recently also, Liebs, op.cit., p.185 and Sacconi, op.cit., p.67f. For earlier scholars see Levy, op.cit., p.209.



extensive comments we shall focus only on certain points of his argument. Liebs<sup>85</sup>, who in common with Litewski believes that the text is sound evidence that in classical law only solutio in the bona fide action in ius released the debtors, nevertheless treats as interpolated the statement, non enim electione, sed solutione liberantur. Litewski believes it to be genuine on the grounds that it fulfills a function in the consistent development of the discussion in the text.<sup>86</sup> He points out that having said that suit could be brought against either joint deposittee Ulpian expresses the negative rule that litis contestatio (agere) with one of the debtors does not release the other (nec liberabitur alter, si cum altero agatur). Ulpian then states positively that it was not the electio but solutio which released the deposittees (non enim ... liberantur). Thereafter in proinde si ... tutorum, solutio is also discussed, again it being said positively that the payment of quod interest by one debtor released the other. If one excludes non enim ... liberantur the text leaps oddly from the negative statement concerning non liberatio to the positive declaration that if one deposittee pays the other is released. Clearly in terms of the development of the discussion the presence of non enim ... liberantur is

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85. Op.cit., p.185.

86. Also, Sacconi, op.cit., p.67 n.47.



preferable because it introduces the point concerning the positive effect of solutio of which proinde si ... tutorum is a consequence.<sup>87</sup>

In the section, proinde si ... tutorum, an important point is raised. We are told that if one of the joint deposites pays what is at issue, the other cannot be sued exemplo duorum tutorum. Litewski<sup>88</sup> plausibly observes that if it were the general rule, without exception, that litis contestatio with one of the joint debtors released the others there would have been no reason to introduce the analogy of the tutors. Furthermore, the authenticity of the statement that only solutio released the deposites is supported by the sources on tutors where a similar rule applied in the iudicium tutelae.<sup>89</sup>

The comparison of the [actio depositi] with the [bona fide actio tutelae] and the reference to quod interest form the basis of Litewski's belief that D.16.3.1.43 always concerned

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87. Albertario, Oblig. Solidali, p.106f sees certain defects in the statement, non enim electione sed solutione liberantur, in particular the idea which it expresses that electio does not extinguish the obligations of either of the debtors, not even those of the person with whom there has been litis contestatio! Litewski, RHD 54, p.153 n.15 and p.156 n.24, points out that this is in fact quite correct because even the defender himself is released, not by litis contestatio, but by solutio.

88. RHD 54, p.157.

89. Litewski, RHD 54, p.163ff; Liebs, op.cit., p.184ff.

the actio depositi in ius<sup>90</sup>. However, Burillo<sup>91</sup>, in support of his opinion that before the intervention of the compilers the text dealt with the actio depositi in factum, suggests that quod interest is interpolated in place of quanti ea res est and that the comparison originally was with the actio rationibus distrahendis. He believes that this latter remedy, like the action in factum<sup>92</sup>, lay in full against each of the parties who had been guilty of dolus. To this particular end Burillo therefore regards as genuine the opening statement in D.16.3.1.43 that if an action is raised against one of the joint depositors the other is not released. Only the remainder of the text does he see as having been subject to manipulation by the compilers who were concerned with suppressing the penal characteristics of the praetorian actio depositi. Burillo then refers to D.44.2.22 as support for the idea that the action in factum lay cumulatively against each of the depositors guilty of dolus.

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90. RHD 54, p.175 n.110; Studien, p.6 n.3.

91. Op.cit., p.265ff.

92. And the authors to whom he refers.

D.44.2.22 (Paul 31 ed.) Si cum uno herede depositi actum sit, tamen et cum ceteris heredibus recte agetur nec exceptio rei iudicatae eis proderit: nam etsi eadem quaestio in omnibus iudiciis vertitur, tamen personarum mutatio, cum quibus singulis sui nomine agitur, aliam atque aliam rem facit. Et si actum sit cum herede de dolo defuncti, deinde de dolo heredis ageretur, exceptio rei iudicatae non nocebit, quia de alia re agitur.

He observes that the text shows that there was no consumption, not even ope exceptionis, as the result of litis contestatio against one of several heirs of the depositee.

Burillo's interpretation is to be rejected. Firstly the part of D.16.3.1.43 which he believes to be interpolated Litewski has shown to be genuine. Secondly the inference which he appears to draw<sup>93</sup> from D.44.2.22 is ill-founded. The text in fact discusses certain problems relating to the heir of the depositee. Therefore, that litis contestatio against one heir did not consume the right of action against the other, prima facie, is weak support for the idea that this was also the case where proceedings were raised against joint depositees because the action lay in full against each. Arguably Burillo could draw support for his thesis from the text if the discussion in the first part (si cum ... aliam rem facit) concerned proceedings against co-heirs who had all been guilty of dolus.

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93. He is not entirely clear.

This is because the position of heirs liable ex dolo suis was similar to that of joint depositors<sup>94</sup>. However the emphatic statement, et si actum sit cum herede de dolo defuncti, deinde de dolo heredis ageretur clearly shows that the opening section of the text was concerned with a claim made against an heir ex dolo defuncti. In this case Paul decides that litis contestatio with him does not preclude proceedings against the other co-heirs. Paul then states that even if the pursuer [again] claimed against an heir ex dolo defuncti this does not barr an action against the same individual ex dolo suo. The important point in relation to the first-mentioned claim ex dolo defuncti is that the single heir is only liable pro parte hereditaria<sup>95</sup>. The pursuer is therefore quite at liberty to proceed against the other heirs in the same degree. Understood in this way we see that a statement that litis contestatio against one heir does not consume the right of action against the others offers no support for the view that the action in factum lay cumulatively against all joint depositors guilty of dolus.

The third argument against Burillo's thesis is the evidence provided by D.45.2.9pr. We have shown that in

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94. See Litewski, *Studien*, p.8ff; also, D.16.3.22 where Marcellus, referring to heirs liable ex dolo suis, says: in solidum conveniri poterunt, ac si ipsi servandam suscepissent.

95. Cf. D.16.3.9 and 10. These texts are discussed at length in the chapter on the liability of the heir ex dolo defuncti.

the action in factum joint depositors were in fact correally liable. Burillo himself agrees that the debtors in that text stood in a relation of correality but only because he erroneously believes that the return of the deposit had been agreed upon by stipulation<sup>96</sup>.

We are now in the position to state our conclusions on the liability of joint depositors. In the action in factum they were correally and certainly not cumulatively liable. In the actio depositi in ius, by the time of Ulpian, simple solidarity may well have been applied. The fact that in this remedy, as in the other bonae fidei iudicia, litis contestatio with one joint debtor no longer consumed the pursuer's right against the others is thought to have been a product, through time, of the operation of the clause ex bona fide<sup>97</sup>. If simple solidarity was only applied in the actio depositi in ius relatively late on in the classical period the question then raised is what system applied here beforehand. It would be reasonable to assume that earlier the action in ius, like the action in factum, gave rise to correality.

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96. Op.cit., p.267f.

97. See Litewski, RHD, p.175.

CHAPTER X

THE LIABILITY OF THE HEIR IN THE ACTIO DEPOSITI

(EX DOLO DEFUNCTI)

THE LIABILITY OF THE HEIR IN THE ACTIO DEPOSITI (EX DOLO DEFUNCTI)

In the next two chapters we will consider the question of the heir's liability in the actio depositi. We shall see that the degree of his liability is affected by two principal factors: (1) whether he is liable ex dolo defuncti, or (2) ex suo dolo. A considerable debate surrounds the extent of his liability in classical law in both of these cases. There is, however, another question which needs to be answered and that is, to which of the actions on deposit do the texts actually refer, the actio depositi in factum or the action in ius? We shall consider in turn the two themes of the extent of the heir's liability and the identity of the remedy in the texts which we discuss.

In this chapter we deal with the position of the heir liable ex dolo defuncti. However, before we examine the texts it will be helpful to say a few words about the term in solidum as it appears in the following discussion. Firstly, it is used in the sense that a single heir is liable for the whole amount of what was due on the obligation (D.16.3.7;9). Alternatively we will find it used in the context of discussions of what is called solidary liability<sup>1</sup>. Liability is said to be solidary here where any one of a plurality of heirs of the depositor can be sued for the whole amount due

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1. For a useful summary of solidary liability, see Thomas, Textbook of Roman Law (1976), p.255ff.



on the obligation. But, solidary liability can be further divided depending on whether it was correal or simply solidary. The essence of this distinction lies in the effect of litis contestatio. In classical law, in a correal relationship, litis contestatio between the person entitled and one of the parties liable on a transaction extinguished the obligation. This rule was changed by Justinian who provided that, where there was a plurality of debtors, litis contestatio against one should no longer discharge the others but only full satisfaction of the obligation (simple solidarity). Put in these terms the relationship between correality and simple solidarity would appear to be of a straightforward historical nature: the one was replaced by the other in the time of Justinian. However, there were certainly examples of simple solidarity in classical law and, though the matter is disputed, the best view is that the nature of Justinian's innovation was merely to substitute this for the cases of correality remaining in his own time<sup>2</sup>.

The distinction between correality and simple solidarity is of relevance to the discussion on the liability of the heir in the actio depositi in the following way: we shall see that it is argued that in classical law the heir ex dolo defuncti was correally liable. That is, where there was a plurality of heirs each was liable in solidum and litis contestatio against one discharged the others. The classical

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2. See, Buckland, Textbook of Roman Law (3rd ed.), p.452ff.

law position was then changed by Justinian. An important consequence of the arguments on correality relates to the condemnation pro parte hereditaria. It is suggested that since in classical law an action was consumed by litis contestatio the bringing of an action (even limited pro parte hereditaria) against one co-debtor extinguished the right to proceed against the others. In fact an action with a condemnation pro parte is regarded as an invention of Byzantine law when the rule that only satisfaction extinguished the obligation made the existence of a remedy formulated in that manner possible for the first time.

It is mainly against the above interpretation that our discussion will be directed. In conformity with the present reading of the texts we shall argue that in classical law where there was a plurality of heirs of a depositor who were liable ex dolo defuncti each could only be sued pro parte hereditaria. By the same token if there was only one heir, he was liable in solidum. The principle that an heir was only liable pro parte hereditaria was also applied in this case, but here, of course, the heir had acquired the whole inheritance.

D.16.3.9 (Paul 17 ed.) In depositi actione si ex facto defuncti agatur adversus unum ex pluribus heredibus, pro parte hereditaria agere debeo: si vero ex suo delicto, pro parte non ago: merito, quia aestimatio refertur ad dolum, quem in solidum ipse heres admisit.

D.16.3.10 (Julian 2 ex Minicio.) Nec adversus coheredes eius, qui dolo carent, depositi actio competit.

Litewski<sup>3</sup> argues that the principles governing the liability of the heir of the depositor which are set out in D.16.3.9 and 10 are genuinely those of classical law. He points out that D.16.3.9 makes an important factual distinction which determines the extent of the liability of the heir: as we said earlier, in each case we must consider (1) whether we are proceeding against one of a number of heirs on account of the dolus of the deceased (ex facto defuncti), in which case we are told that we should bring the action pro parte hereditaria, or (2) whether the heir himself is the person guilty of dolus (ex suo delicto) in which case we should bring the action against him for the full amount (pro parte non ago), which is to say that the heir in this instance is liable in solidum<sup>4</sup>.

D.16.3.10 (Julian 2 ex Minicio) is a text which complements D.16.3.9. It states that an actio depositi does not lie against co-heirs who themselves are not guilty of dolus.

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3. Studien zur Verwahrung im römischen Recht (Warsaw/Krakow, 1976), p.9ff. Also, Rotondi, Scritti 2 (Milan, 1922), p.126 n.1 who regards the text (D.16.3.9) as essentially genuine, except the concluding statement merito ..... fin which he admits may be interpolated. Also, Beseler, ZSS 45 (1925), p.465 and ZSS 46 (1926), p.95ff, who, although he offers criticisms of the text, regards the principles that the heir is liable pro parte hereditaria for the dolus defuncti, and that he is liable in solidum for his own dolus, as being authentic. With regard to the text itself, Beseler sees the part referring to the liability pro parte hereditaria as genuine, but the part from si vero .... fin as an addition concerned with amplifying the earlier part of the text. However, in making this addition, according to Beseler, the classical rule that the heir was liable in solidum for his own dolus has been correctly reproduced.

4. Litewski, op.cit., p.9 and p.9 n.15.

The text is clearly referring to the situation where only one of the co-heirs has been guilty of dolus and as such it develops the statement made in the latter half of D.16.3.9<sup>5</sup>. From what is said in D.16.3.10 Litewski makes the deduction that where a plurality of heirs of the deposittee were themselves guilty of dolus, again they were liable in solidum<sup>6</sup>.

The authenticity of these texts has, however, been attacked. To begin with we will look at the objections of both Albertario<sup>7</sup> and Sorrentino<sup>8</sup>. Albertario approves the opinion of Sorrentino that D.16.3.9 is interpolated, Sorrentino's thesis being that for classical law in a plurality of heirs of a fraudulent deposittee each heir was liable in solidum and not pro parte hereditaria. It is convenient to deal with both these scholars together because they give differing emphases in the objections which they raise to the present form of the text. Albertario presents his objections in greatest detail: (1) as a general point he believes that the word delictum came, in the post-

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5. See Evans-Jones, The Prefatory Section of D.16.3, RIDA 1978, p.247ff.

6. Dolus on the part of the heir was treated just like dolus on the part of the deposittee himself (D.16.3.22). Hence a plurality of heirs guilty of dolus, with some qualifications, was liable in solidum just like a plurality of deposittees (D.16.3.1.43; D.45.2.9<sup>pr.</sup>; there is a full discussion of these texts in earlier chapters). Note that we use the term in solidum of the single heir in D.16.3.9 merely in the sense that he is liable for the whole. Used here of the plurality of heirs, the term has the more technical meaning of those whose liability was either correal or simply solidary, depending on one's view of which of these forms of liability applied to deposit in classical law.

7. Studi 3 (Milan, 1936), p.167.

8. La Responsabilita degli Eredi pel Dolo del Defunto nell' actio depositi nel Diritto Romano (Rome, 1903).

classical and Byzantine periods, to be used in place of the word dolus even where this arose from a contract<sup>9</sup>. D.16.3.9 is one of the texts where he thinks that this has occurred. In addition, he points to the lack of congruity in the antithesis ex facto defuncti/ex suo delicto, to the grammatically incorrect, si agatur ..... non ago ..... ago, and to the banal nature of the statement, si vero ex suo delicto, pro parte non ago. Above all, however, Albertario objects to the expression in solidum dolum admittere which is used of the dolus of only one person. His point here is that if there was only one person guilty of dolus, he must necessarily be the person wholly guilty of the dolus.

The reconstruction of the text - which is in fact suggested by Sorrentino<sup>10</sup> - runs as follows:

In depositi actione, si ex facto defuncti agatur adversus unum ex pluribus heredibus, pro parte non ago; merito, quia aestimatio refertur ad dolum quem in solidum ipse admisit.

We should note that, according to Sorrentino, Paul stated that where we proceed against one of a number of heirs on account of the dolus defuncti the action is not divided because the aestimatio refers to the dolus of which the deceased had been wholly guilty. This illustrates Sorrentino's view that in classical law heirs in the case of a deposit were each liable in solidum ex facto defuncti.

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9. Op.cit., p.164.

10. Op.cit., p.25.

Proceeding to D.16.3.10, this text is also regarded as having been interpolated by Sorrentino. Founding on his belief that in classical law litis contestatio against one of the co-depositees consumed the action against the others, he suggests that Julian wrote <lite contestata> nec adversus coheredes eius depositi actio competit. The change in the effect of litis contestatio in the time of Justinian, that is the substitution of simple solidarity in place of the classical correality, necessitated the alteration of the text. This, Sorrentino argues, was done by the introduction of the phrase, qui dolo carent, with the effect that while in classical law recourse against the other co-heirs was excluded by the consuming effect of litis contestatio, in the Justinianic version of the text, as litis contestatio no longer had a consuming effect, recourse was now to be excluded against the remaining heirs because they had not been guilty of dolus.

Before considering the above criticisms in detail it is worthwhile to advert briefly to D.16.3.18.

D.16.3.18 (Neratius 2 membr.) De eo, quod tumultus incendii ruinae naufragii causa depositum est, in heredem de dolo mortui actio est pro hereditate portione et in simplum et intra annum quoque: in ipsum et in solidum et in duplum et in perpetuum datur.

The text is of interest because it tells us that de dolo mortui the heir in necessary deposit was liable to the extent of his share of the inheritance (actio est pro hereditate portione). We are told that the action against the depositor himself lay in solidum. This speaks for the authenticity



of the part of the text which states that de dolo mortui the heir was liable to the extent of his share of the inheritance because Neratius's purpose seems to have been to bring out the contrast in three characteristics of the two actions to which he was referring<sup>11</sup>. The contrast in the extent of each individual's liability subsists precisely on the juxtaposition, pro hereditate portione/in solidum. In D.16.3.18 Neratius is discussing necessary deposit and hence not the same action as Paul in D.16.3.9. Nevertheless the former text does establish that in classical law an actio depositi - in this case formulated in factum - lay against the heir pro parte hereditaria on account of the dolus of the deceased. This is important because in the context of ordinary deposit Sorrentino<sup>12</sup> has objected that since in classical law an action was consumed by litis contestatio the bringing of one even limited pro parte hereditaria against a single co-debtor extinguished the right to proceed against the others. However, on the authority of D.16.3.18 it must follow that an action pro parte hereditaria against the heir ex facto defuncti was at least possible in principle in classical law in cases of ordinary deposit.

One more preliminary observation may be made, this time on Sorrentino's reconstruction of D.16.3.9. If indeed an action pro parte was excluded in classical law due to the consuming

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11. The text has escaped the attention of the interpolationists.

12. Op.cit., p.21ff .



effect of litis contestatio it is odd that Paul should find it necessary to say that when I bring an action against an heir on account of the deceased's dolus, pro parte non ago. At least it must be said that the way in which the statement is formulated - pro parte non ago - would be very odd, for in this case the fact that I should not proceed pro parte would be self-evident. Furthermore, if Sorrentino were correct, perhaps even more surprising would be the way in which Paul justifies this decision; viz, the merito .... admisit clause which Sorrentino retains as authentic in his reconstructed version of the text.

Bearing these points in mind we now turn to a consideration of the individual objections raised by Albertario against the present form of D.16.3.9: firstly the contrast between factum defuncti/suo delicto. Litewski<sup>13</sup> remarks that in spite of its grammatical incorrectness this usage is natural; but he gives no reason to substantiate this view beyond referring us to Rotondi<sup>14</sup> who is no more explicit. We can be sure that the terms factum and delictum denote the dolus of the deceased and of his heir respectively. Neratius in D.16.3.18 speaks more correctly of the dolus mortui, as does Ulpian in D.16.3.7.1 (ex dolo defuncti). Paul, in speaking of ex facto defuncti differs from the above two jurists but no conclusions can be drawn from this. More surprising is Paul's usage of the term

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13. Studien, p.10.

14. Op.cit., p.126 n.1.

delictum, especially perhaps, as is pointed out by Albertario, where this stands for the dolus arising from the 'contract' of deposit. The word delictum does not appear to be used here in the technical sense of a delict as opposed to a contract.

Longo<sup>15</sup> has pointed out that little purpose would have been served by the compilers substituting factum and delictum for the individual term dolus, which speaks for the formers' authenticity. Possibly the explanation for Paul's use of these terms lies in the fact that he is considering the amount for which the actio depositi should be brought against an individual heir. On account of the actings of someone who is dead the neutral term ex facto defuncti is used and the action in this case lies pro parte hereditaria. On the other hand for his own actions, and precisely because it is for his own actions, the more emotive expression ex suo delicto is used. In this case the action does not lie pro parte but for the full amount (pro parte non ago). The term delictum brings a greater sense of immediacy and wrongdoing to the actions of the heir in the context of which his full liability is more appropriate than his mere part liability on account of the more distant actings of the deceased.

The second objection concerns the grammatically incorrect, si agatur ..... agere debeo ..... ago. Litewski<sup>16</sup> concedes that there is an irregularity here but argues that one cannot deduce a change of substance on these grounds alone.

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15. Delictum e Crimen (Milan, 1976) who argues that the use of these terms is genuine.

16. Op.cit., p.10.

Alternatively, we can read agatur in the sense, 'I set about taking legal proceedings,' in which case the seeming duplication with the verbs which follow is explained.

Albertario's next objection relates to the sentence, si vero ex suo delicto pro parte non ago. The point he makes is that once one has said that the action against the heir ex facto defuncti lies pro parte hereditaria, the words si vero ..... non ago have the appearance of an addition whose function has simply been to fill out the first statement. As such the clause is a statement of the obvious and for this reason Albertario sees it as banal. However, it does not necessarily follow from the fact that the heir is liable in part for the dolus of the deceased that he will be liable in solidum for his own dolus. In addition, Litewski<sup>17</sup> observes that in an edictal commentary we would expect a jurist to give a full statement of the rules applicable in both cases; that is, in the case both of the dolus of the deceased and of his heir.

Finally we come to the concluding part of the text, merito .... .. heres admisit. To the criticisms of Albertario we should add those of Guarneri Citati<sup>18</sup>. He casts doubt on the authenticity of the justification given in the text for the heir's solidary liability, namely that aestimatio refertur ad dolum, pointing out that in deposit one never made a valuation of the dolus as such but of the value of the property. Those

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17. Op.cit., p.10.

18. Studi sulle Obbligazioni Indivisibili nel Diritto Romano, Ann. Palermo 9 (1921), p.5ff at p.44.

texts which speak of a valuation of dolus or culpa he maintains are interpolated. He also suggests that the expression admittere dolum in solidum is not a happy phrase for expressing the fact that the dolus related to all of the deposited property. Indeed the very concept of dolus in solidum or in partum admissus he sees as corrupt.

Again, however, according to Litewski<sup>19</sup>, the text is genuine. He argues that the term aestimatio was certainly used in the context of discussions of the divisibility of the obligation in deposit. In the case of the dolus of the deceased one had to claim pro parte hereditaria, and it was the aestimatio<sup>20</sup> which allowed an exact division of the liability to be made in the condemnation. Similarly, in the case of the heir's own dolus imposing liability in solidum, it was in the aestimatio that the level of the sum involved was fixed. Here the whole amount fell on the heir on account of his own dolus, and this, suggests Litewski, was the point which the jurist was making in the merito ..... admisit sentence. We may agree with Litewski on what the Roman jurist was intending to say here, but his explanation in fact misses the point of the statement merito ..... admisit. Litewski fails adequately to explain Paul's choice of reasoning. To speak of dolum in solidum admisit signifies a particular degree of 'fraudulence' on the part of the heir. The introduction of the idea of degrees of dolus is best explained by the fact

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19. Op.cit., p.10.

20. The aestimatio was 'the valuation in money of things, or of damages and all kinds of losses one suffered'; Berger, Encyclopaedic Dictionary of Roman Law, p.355; see also Kaser, RPR 1 (Munich, 1971) p.499 n.7.

that Paul is making a comparison between the position of this heir and others. The comparison to which Litewski draws attention, however, is that between the heir's part liability ex facto defuncti and his solidary liability ex suo delicto. But degrees of dolus are irrelevant here as the question in this comparison is, whose is the dolus, not, what is the extent of this particular individual's dolus. To clarify these issues further it is helpful to take the merito ..... .. admisit sentence in two halves: we begin with the statement aestimatio refertur ad dolum.

We should note that Paul is concerned in this text with the procedural problems raised by the question of the amount a depositor should claim from the heir of the deceased depositor where his property has not been returned<sup>21</sup>. The factor which distinguishes the two claims considered in D.16.3.9, and thus the amount to be claimed from each heir, is whether the dolus was committed by the deceased or by the heir himself. Viewed in these terms we see that an important factor affecting the level of the aestimatio (whether it will be pro parte or not) is that of the parties' dolus. Therefore, firstly we can conclude that in a discussion of this nature there is no reason to object to the phrase aestimatio refertur ad dolum.

However, to say, quite plausibly, that the aestimatio refers to dolus is arguably a different matter from what follows,

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21. Consistent with the palingenesia, de interrogantibus in iure faciendis, Lenel, Pal.1, p.994.

namely that the heir is guilty of dolus in solidum. This expression denotes the degree of the heir's own dolus which, prima facie, is an irrelevant consideration for the purposes of the aestimatio once the initial fact of his liability has been established.

However, again we should take particular note of the factual situation with which Paul is dealing in the text; he is discussing the question of claims against unum ex pluribus heredibus. In the first case, where this heir is sued ex facto defuncti, the claim is pro parte hereditaria. In the second the claim is ex suo delicto, where, the jurist says, pro parte non ago. Of course, the very fact that we are told here that we should not proceed pro parte confirms the existence of other co-heirs against whom we could have raised an action. The function of the merito ..... admisit sentence is to justify the fact that the claim against the heir in this case should be for the whole amount. The important point is that the justification is required, not because the claim against the heir was only pro parte on account of the deceased's dolus, but because ex suo delicto no claim can be raised against his co-heirs. The reason is that it is he alone who has been guilty of dolus, and this is precisely the point which Paul makes when he says that the heir has been guilty of dolus in solidum.

Understood in this way we see that Albertario's principal objection to the present form of the text is illusory. Also,



Guarneri Citati misunderstands the passage when he criticises the expression admittere dolum in solidum as an inappropriate phrase for expressing the fact that the dolus related to all of the deposited property. This is not what Paul intended to say<sup>22</sup>. In fact the expression denotes the degree of the fraudulent heir's dolus and this is quite understandable in the context of a sentence which purports to justify his complete liability on the grounds that he alone of the co-heirs has acted wrongfully. The term in solidum is used quite properly with dolus here. In the texts on deposit, in solidum is generally used in the sense that a particular defender is wholly liable; here Paul uses the term to say that one of the heirs has been wholly guilty of the dolus.

We now must turn again briefly to the question of the aestimatio and its relationship to dolus. As we said earlier, the question of dolus is relevant to the distinction between an heir's liability pro parte ex facto defuncti and his complete liability ex suo delicto. As regards these claims the pertinent consideration is, who was guilty of dolus, the heir himself or the deceased? Now we must ask whether it is still possible to speak in the terms, aestimatio refertur ad dolum,

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22. Guarneri Citati, op.cit., p.42<sup>f</sup> makes two further objections to the present form of the text with which we have not dealt: (1) that it is formulated in too general a manner so that the solidary liability of the heir ex suo delicto is not subject to the condition that the property was indivisible; (2) that the introduction of the last sentence by merito is odd because this word was used by jurists when commenting on the decisions and responsa of earlier jurists, not when commenting on provisions of the edict. Both these points are dealt with satisfactorily by Litewski, op.cit., p.10 and p.10 n.21.



where the pursuer is proceeding on the grounds of dolus on the part of one of the heirs. Is it not artificial to speak of the aestimatio referring to dolus when what is really meant in this case is that an action lies only against a person who has been guilty of dolus?

Again the answer to this question is given by the facts. I propose to bring an action against one of a number of co-heirs. Possibly I intended to bring actions against the other co-heirs at a later date but this is not the issue under consideration in the text. The point is, how much do I claim from this heir whom I am in the process of suing? Paul tells us that ex suo delicto my claim should be for the full amount. The quantum of my claim is the aestimatio which I make in this particular action. The aestimatio is referred to the dolus because Paul wants to justify the bringing of the action for the full amount and the reason given is that the heir whom I am presently suing is the one who has been wholly guilty of the dolus. Paul states the justification in this way, as opposed to a statement to the effect that a claim only lies against those heirs who have been guilty of dolus, precisely because he is dealing with the question of the amount which I should claim from this one heir whom I am presently suing.

Support for the above arguments on D.16.3.9 is provided by D.16.3.10. We have argued that the key to understanding the merito ..... admisit sentence is that Paul is justifying the fact that the dolose heir is liable for the whole amount

(and that no claim as a result will lie against his co-heirs.) However, the reference to the co-heirs in D.16.3.9 is only implicit and has to be understood from the fact that the discussion concerns claims against unum ex pluribus heredibus. But this hypothesis is confirmed by D.16.3.10 where the reference to the co-heirs is explicit. Certainly D.16.3.10 is formulated from a quite different perspective, but this is not surprising. The text is from a different jurist who was not dealing with the special procedural problems, which Paul was, of the amount to be claimed from the one heir presently being sued. In his original work<sup>23</sup> Julian said that an actio depositi does not lie against a dolose heir's innocent co-heirs. This statement was used by the compilers as a development on the latter part of D.16.3.9. Clearly they appreciated the nature of the problem being discussed by Paul.

Finally, we should observe that, given there are no arguments sufficiently strong to question the authenticity of D.16.3.9, and that what Julian says conforms with the classical law doctrine presented in that text, Sorrentino's objections to D.16.3.10 are also best rejected<sup>24</sup>.

On the position of the heir ex dolo defuncti, D.16.3.9 tells us that where suit is brought against one of a number of co-heirs the action lies pro parte hereditaria. We must now

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23. For a discussion of the palingenesia of this text, see the relevant part of the chapter on the construction of D.16.3.

24. See further, Litewski, op.cit., p.10 n.25.

consider the position where there is only a single heir. We would expect the same principle to be applied in this case, viz, that he also was liable pro parte hereditaria. However, in this context, the principal text causes difficulties because it tells us that he is liable in solidum. We shall argue that the solution to this problem lies in the fact that a single heir, although in principle liable pro parte hereditaria, takes the whole inheritance. Therefore, a jurist might still reasonably say that he is liable in solidum, meaning by this that as the only heir he takes over liability for the whole obligation on the basis of his receipt of the whole inheritance.

D.16.3.7.1 (Ulp. 30 ed.) Datur actio depositi in heredem ex dolo defuncti in solidum: quamquam enim alias ex dolo defuncti non solemus teneri nisi pro ea parte quae ad nos pervenit, tamen hic dolus ex contractu reique persecutione descendit ideoque in solidum unus heres tenetur, plures vero pro ea parte qua quisque heres est.

D.16.3.7.1 has given rise to a number of different interpretations. Longo<sup>25</sup> argues that if the action against the heir in necessary deposit lay only for a year (annual)<sup>26</sup> then, a fortiori, the action in the case of ordinary deposit must also have been annual. He therefore suggests that originally this text contained a statement to the effect that the actio depositi was annual but that this was suppressed by the compilers who forgot, however, to excise from D.16.3.18

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25. Il Deposito (Milan, 1946), p.55f.

26. D.16.3.18. A full discussion of this question is found in the chapter on the duration of the actio in factum.

the statement concerning the annual nature of the action for necessary deposit. Since there is no reason to suggest that D.16.3.7.1 ever contained such a statement Longo's suggestion should be rejected.

The basis for Burillo's<sup>27</sup> criticisms of D.16.3.7.1 is found in his analysis of D.16.3.9. He accepts as genuinely representative of the approach of the classical jurists the contrast made by Paul between the action in solidum and the action pro parte. In the case of dolus defuncti the heir was liable pro parte hereditaria, but ex suo dolo he was liable in solidum. Retaining the purity of this classical law contrast, Burillo thinks that Ulpian in D.16.3.7.1 possibly said something along the lines of, datur actio depositi in heredem ex dolo defuncti pro ea parte qua quisque heres est, and that this was impliedly in contrast to the solidary liability of the heir for his own dolus. On the other hand, according to Burillo, the contrast now found in the text is between liability in solidum and 'to the extent of our enrichment' (pro ea parte quae ad nos pervenit). This contrast, he argues, was made by the compilers. Furthermore, as a consequence of the changes which the compilers made, Burillo suggests that we now find a contradiction between the statement made at the beginning of the text that the action is given against the heir ex dolo defuncti in solidum, and the statement at the end that in the case of a number of heirs the action lies against each in the proportion pro ea parte

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27. Las Formulas de la actio depositi, SDHI 28 (1962), p.233ff at p.258ff.

qua quisque heres est. In addition to this alleged contradiction Burillo points to hic dolus ex contractu reique persecutione descendit as evidence of corruption. He says that this phrase could not possibly have come from Ulpian. Also, he points to ideoque which he sees as a word used to tie together the post-classical pieces of the text.

Firstly we must deal with Burillo's argument that there is a contradiction between Ulpian's statement in D.16.3.7.1 that the heir ex dolo defuncti is liable in solidum and Paul's statement in D.16.3.9 that he is liable pro parte hereditaria. The solution to this seeming contradiction lies in the meaning we give to the term in solidum. Does it mean - as Burillo reads it - that the action ex dolo defuncti must be brought for the full amount against a single heir even where he is one of a number of heirs (i.e. correality or simple solidarity)? Or, applying pro ea parte qua quisque heres est, does it mean that a single heir is liable for the whole amount because there are no co-heirs and thus he takes the whole inheritance? Clearly in the present form of the text the latter interpretation is correct. Paul, whose discussion was of procedure, expressly states that the action lies pro parte if we bring it ex facto defuncti against one of a number of co-heirs (adversus unum ex pluribus heredibus). Ulpian, in his opening statement in D.16.3.7.1, was dealing with a factually different situation, for, as is confirmed later in the text (in solidum unus heres tenetur .....), he was stating the rule that the actio depositi is given in solidum ex dolo defuncti where there was only one heir. Certainly we must concede that the context of in solidum in Ulpian's first use of the term is

explained only in the later part of the text which may be an addition. Therefore, it is of course possible to argue that the compilers changed the original meaning of in solidum by the addition of quamquam ..... fin. However, if a jurist did consider the position of the single heir ex dolo defuncti we must equally admit that there is nothing odd in his having said that the heir is liable in solidum. Also, this conforms with Paul's statement in D.16.3.9, the only difference being that the jurists were dealing with factually different cases.

If we accept the above arguments this also explains Burillo's other suggestion that Ulpian contradicts in the statement plures vero pro ea parte qua quisque heres est, what he said at the beginning of the text concerning the solidary liability of the heir. The heir is said to be liable pro parte because he is one of a number of co-heirs. It is the single heir ex dolo defuncti whom Ulpian says is liable in solidum.

The next difficulty relates to Burillo's argument that the contrast found in D.16.3.7.1 between liability in solidum and liability to the extent of enrichment is not classical but due to the compilers. However, we must ask whether Ulpian in fact makes such a contrast in the text? The answer to this question is essentially one of emphasis.

Ulpian opens D.16.3.7.1 with the statement that the heir is liable in the actio depositi ex dolo defuncti in solidum. In the section of the text which follows there is certainly a contrast of sorts between this liability and liability for



enrichment. But, the construction of the argument clearly shows that the author had in mind the fact that in certain other cases the liability of the heir ex dolo defuncti was pro ea parte quae ad nos pervenit, and, that he was concerned with explaining why this was not the case in deposit where the single heir was liable in solidum. The fact that there were these cases where ex dolo defuncti the heir was liable for enrichment provides the reason why Ulpian felt it necessary to explain the liability in solidum of the heir in deposit. The important point is that viewed in these terms the function of the section of the text, quamquam ..... descendit, is complementary to the initial statement of Ulpian's that the heir is liable in solidum. This is confirmed by the clause ideoque in solidum unus heres tenetur. The word ideoque ties in quamquam ..... descendit as a form of short commentary on the proposition of the heir's liability in solidum. If this is correct, the primary contrast in the text is not, as alleged by Burillo, between solidary liability and liability for enrichment, but, as is shown in the concluding statement plures vero pro ea parte qua quisque heres est, between liability in solidum and liability pro parte. Ulpian introduces the concept of the single heir's liability in solidum, and, for the reasons stated, thinks that this liability in the case of deposit needs to be explained, which he does in the section quamquam ..... unus heres tenetur. This should be counted as the first half of the text, and the liability in solidum referred to therein is contrasted with the liability pro parte which is referred to in the remainder and second half of the text.



Even if Ulpian's primary contrast in the text had been between liability in solidum and liability to the extent of enrichment, this, by itself, would provide inadequate grounds for alleging interpolation. As it is, however, both Paul in D.16.3.9 and Ulpian in D.16.3.7.1. contrast liability in solidum with liability pro parte. The difference between the two jurists is that they choose factually different situations to illustrate this contrast. Paul contrasts the liability pro parte of one of a number of co-heirs ex facto defuncti with the liability in solidum of a single heir ex suo delicto; Ulpian the liability in solidum of a single heir ex dolo defuncti with the liability pro parte of the heir where he is one of a number of co-heirs. Even were both D.16.3.9 and D.16.3.7.1 taken from the same jurist they could not be viewed as incompatible. Therefore, if we accept the principles presented by Paul in D.16.3.9 as representative of those of classical law, as Burillo suggests we should, it follows that D.16.3.7.1 also has to be treated as substantially genuine.

Turning to Sorrentino<sup>28</sup>, there is a common feature in his treatment of D.16.3.7.1 with that of Burillo. He also thinks that the text contains contradictions, except that the conclusions he comes to differ significantly from those of Burillo. Sorrentino takes as representative of the position in classical law Ulpian's opening statement, datur actio depositi in heredem ex dolo defuncti in solidum; in solidum

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28. Op.cit., p.9ff.

in this case meaning that the heir was correally liable. Therefore, as far as the Italian scholar is concerned, the heir was liable for the whole amount whether he was the only heir or one of a number of co-heirs. Apart from the last part which deals with the passive transmissibility of the actio depositi against one heir and against a number of heirs, Sorrentino believes that the whole passage is concerned simply with demonstrating why the heir was liable in solidum (correality). It is only the concluding statement ideoque ... .. heres est which, in its present form, he sees as odd, and it is precisely here, in particular in the assertion plures vero pro ea parte qua quisque heres est, that he sees the contradiction with the proposition concerning the solidary liability of the heir as lying because we are now told that the heir is liable pro parte.

To illustrate the contradictions in the text further, Sorrentino divides the part from quamquam ..... fin into three sections: firstly he takes the statement (1) quamquam alias ex dolo defuncti ..... solemus teneri ..... pro ea parte quae ad nos pervenit. The significance of this section is that it states what appears to be the general rule that in other cases ex dolo defuncti the heir is liable for enrichment; and this is in contrast to the solidary liability of the heir in deposit. There follow the statements: (2) tamen hic (deposito) ..... in solidum unus heres tenetur and (3) plures vero pro ea parte qua quisque heres est. This last rule Sorrentino argues cannot be reconciled with the previous two. The reason for this is firstly, as we have seen above,

that in statements (2) and (3), if we ignore the fact, as Sorrentino appears to, that one is stating the position of a single heir and the other the position where there is a number of co-heirs, we are told that the heir is liable in solidum and then that he is liable pro parte. The second problem refers to the relationship between statement (3) and statement (1) which says that in the other cases the heir is held liable ex dolo defuncti pro ea parte quae ad nos pervenit. Ulpian's purpose is to contrast this degree of liability with that of the heir in deposit, and indeed such a contrast is provided, argues Sorrentino, in the statement that the heir in deposit is liable in solidum (tamen hic <deposito> ..... in solidum unus heres tenetur). However, according to Sorrentino, the concluding section of the text plures vero pro ea parte qua quisque heres est is odd when taken with the statement concerning the other cases because it says that where in deposit there is a number of co-heirs, they are liable pro parte, and hence the extent of their liability is the same as that of the heir in the other cases referred to, to which deposit is supposed to be contrasted. The offending part of the text therefore, as far as Sorrentino is concerned, is the plures vero pro ea parte qua quisque heres est. He treats this as an addition and suggests that originally the text concluded as follows: ideoque in solidum omnes heredes tenentur.

The nature of the first contradiction alleged by Sorrentino is identical to that suggested by Burillo and is therefore

to be rejected for the same reasons; that is that when Ulpian says that the heir is liable in solidum he is referring to the case where there is only one heir, but that where he says that the heir is liable pro parte this is because there is a number of co-heirs. The different rules relate to factually different situations.

Sorrentino's second objection is no better founded because the content of the first statement is quite different from that of the last statement to which he refers. The liability of the heir ex dolo defuncti in the other cases which Ulpian mentions is pro ea parte quae ad nos pervenit as distinct from the liability pro ea parte qua quisque heres est of a plurality of heirs in deposit. Certainly the liability in each of these cases is pro parte of a sort, but in the former Ulpian is clearly referring to the extent of the heir's enrichment, while in the latter to the proportion of the inheritance which the heir has received which is the factor which determines the extent of the liability in deposit. The independence of these two concepts is demonstrated by the fact that in deposit one of a number of heirs is liable in proportion to his share of the inheritance irrespective of the extent of his enrichment.

There is therefore nothing in the substance of the rules contained in D.16.3.7.1, nor in the way in which they are expressed which could support the argument that they are interpolated. However, the statement of these rules appears at the beginning and at the end of the text; in between

stands quamquam ..... descendit which purports to explain why in deposit the single heir ex dolo defuncti is liable in solidum. Some scholars have focused on irregularities which they see in this section and on the basis of these objections have questioned the authenticity of the rules themselves. A full consideration of quamquam ..... descendit is best treated as part of the discussion of the second theme of the chapter, namely the identity of the actio depositi; whether in factum or in ius, in the texts which we have discussed. Suffice it to say at this point that no argument raised in relation to quamquam ..... descendit is of sufficient weight to throw the authenticity of the rules themselves into doubt. Therefore we are in the position to formulate our conclusions on the liability of the heir ex dolo defuncti.

In D.16.3.9 Paul considers the position of one of a number of co-heirs. He contrasts the liability of this heir ex dolo defuncti with his liability ex dolo suo. In the former case the heir is liable pro parte hereditaria, in the latter, in solidum. Ulpian in D.16.3.7.1 begins with the consideration of the position of the single heir who, he says, is liable in solidum which means that the heir is liable for the whole obligation. The difficulty relates to determining the principles applied in this case of liability in solidum. That is to say, even if there were a number of co-heirs liable ex dolo defuncti would each heir individually be liable for the whole (correality/simple solidarity)? Alternatively was the principle pro parte hereditaria applied, the liability in solidum at the beginning of D.16.3.7.1 being explained by

the fact that the single heir took the whole inheritance? It is clear from Ulpian's concluding statement, in solidum unus heres tenetur, plures vero pro ea parte qua quisque heres est, that the second interpretation is correct. Therefore there is nothing inconsistent in the opinions of Paul and Ulpian. In classical law in the actio depositi the heir ex dolo defuncti was liable pro parte hereditaria. In a discussion of the position of the single heir, for the reasons stated, we also find it said that he was liable in solidum.

The foregoing discussion establishes the fact that in classical law an actio depositi could be brought against the heir ex dolo defuncti pro parte hereditaria. We must now determine whether the texts refer to the action in factum or that in ius. It is universally agreed that the actio depositi in ius was always passively transmissible<sup>29</sup> and generally it is thought that in classical law the action in factum was passively intransmissible.<sup>30</sup>

D.16.3.7.1; 9 and 10, therefore, are often referred to

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29. See in particular, Karlowa, R.Rg. 2 (Leipzig, 1901) p.1313 and Rotondi, Scritti 2, p.49f.

30. This view - following Karlowa, op.cit., p.1313 - is held in all of the main treatments on depositum. But cf, Taubenschlag, Zur Geschichte des Hinterlegungsvertrages im römischen Recht, Grünhuts Zeitschrift 35 (1908) p.129ff at p.133f who believes that when introduced the action was passively intransmissible but that by classical law it lay against the heir ex dolo defuncti pro parte hereditaria.

the action in ius.<sup>31</sup> We shall argue that the texts in fact refer to the action in factum and show that it lay against the heir ex dolo defuncti pro parte hereditaria, certainly in classical law. We shall also show that there is no good reason to think that the position with respect to its passive transmissibility was any different when this action was first introduced.

We begin by examining the arguments advanced to prove that the action in factum for ordinary deposit was passively intransmissible. Firstly, the edict preserved in D.16.3.1.1<sup>32</sup> expressly states that in the case of necessary deposit an action did lie against the heir ex dolo defuncti. The fact that no mention is made of a similar action for ordinary deposit is said to mean that such an action did not exist.<sup>33</sup>

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31. Most clearly by Burillo, SDHI 28 (1962) p.260f.

32. D.16.3.1.1 (Ulp. 30 ed.) Praetor ait: quod neque tumultus neque incendii neque ruinae neque naufragii causa depositum sit, in simplum, earum autem rerum, quae supra comprehensae sunt, in ipsum in duplum, in heredem eius, quod dolo malo eius factum esse dicetur qui mortuus sit, in simplum, quod ipsius, in duplum iudicium dabo.

33. See Karlowa, op.cit., p.1313; Rotondi, Scritti 2, p.50.



Support for this deduction is drawn from D.16.3.18<sup>34</sup> (Neratius 2 membr.). Neratius, it is agreed<sup>35</sup>, was commenting on the edict. He identifies three characteristics of the action for necessary deposit available against the heir ex dolo defuncti and contrasts these with the characteristics of the action which lay against the deposittee himself. The text is construed to be a statement by the jurist that only in the case of necessary deposit did an action lie against the heir ex dolo defuncti. Such a statement is explicable solely on the basis that no action lay against the heir ex dolo defuncti in ordinary deposit.<sup>36</sup>

Thirdly, it is argued that because liability in the action in factum was only for dolus it could not have been passively transmissible,<sup>37</sup> at least pro parte hereditaria.

Lastly, some reliance is placed upon a statement of Theophilus that the actio depositi was passively

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34. D.16.3.18 (Neratius 2 membr.) De eo, quod tumultus incendii ruinae naufragii causa depositum est, in heredem de dolo mortui actio est pro hereditaria portione et in singulum et intra annum quoque: in ipsum et in solidum et in duplum et in perpetuum datur.

35. See the discussion of this text in the chapter on the duration of the actio in factum.

36. See Rotondi, Scritti 2, p.50 and Maschi, La Categoria dei Contratti Reali (Milan, 1973) p.191 both of whom refer with approval to Karlowa.

37. Burillo, op.cit., p.261.

intransmissible.<sup>38</sup> It is assumed that Theophilus must have had the action in factum in mind.<sup>39</sup>

Do these points establish the fact that the action in factum did not lie against the heir pro parte hereditaria? In the edict there is a statement to the effect that in necessary deposit the action did lie against the heir ex dolo defuncti. Certainly there is no such statement with respect to ordinary deposit. One might possibly argue that if the edict in its present form in D.16.3.1.1 is an amalgam of separate provisions put together at a later date,<sup>40</sup> the part of the original edict on ordinary deposit which dealt with the liability of the heir has been dropped. The motive for the omission of this part would be a desire for an elegant progression in the measure of damages in the remedies given in the reconstruction from in simplum to in duplum and again from in simplum to in duplum. The intrusion of a further action in simplum in the text would destroy this harmony. However, we have already argued that D.16.3.1.1 reproduces the edict essentially in its original form.<sup>41</sup>

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38. See Ferrini, Institutionum Graeca Paraphrasis 2, p.464 line 22ff ... Aliquando tamen ex contractu actio in heredes non competit. Ut ecce, rem apud te deposui; deinde dolo tuo omnino periit aut deterior facta est, neque ullum lucrum inde heredi tuo pervenit. Non tenebitur [heres] depositi actione, licet depositum contractus sit.

39. Karlowa, op.cit., p.1313; Rotondi, Scritti 2, p.377 and the literature he cites at n.5.

40. See the chapter on the edict.

41. See the chapter on the edict.

The fact that the edict in D.16.3.1.1 specifically gives an action against the heir ex dolo defuncti in the case of necessary deposit is used as an argument to show that no such remedy was available in the case of ordinary deposit. Firstly, we should observe that in the case of necessary deposit the measure of damages given in the action against the heir ex dolo defuncti (in simplum) is different from the measure given against the depositor himself (in duplum). Precisely because of the difference, in this case mention of the remedy against the heir had to be made, where in ordinary deposit, because the action against the heir ex dolo defuncti and the action against the depositor himself were both in simplum, it was not necessary.<sup>42</sup> Secondly, we have shown<sup>43</sup> that the action for necessary deposit was derived from the old penal action of the XII Tables; it also carries over from that action the condemnation in duplum. Multiple damages is a classic feature of penal actions and penal actions in principle are passively intransmissible.<sup>44</sup> This is a further reason why it may have been thought necessary to make an express

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42. I am indebted to Professor G.D. MacCormack for this observation. In this context it is interesting to observe that Burillo, op.cit., p.261 maintains that the actio commodati in factum was passively transmissible but not the actio depositi in factum. Yet, D.13.6.1pr. (Ulp. 28 ed.) which reproduces the edict for commodatum : ait praetor : quod quis commodasse dicetur, de eo iudicium dabo; makes no mention of a remedy available against the heir. Why, therefore, should we expect anything different for the ordinary case of deposit?

43. See the chapter on the action of the XII Tables.

44. Gaius, 4.112 ... est enim certissima iuris regula, ex maleficiis poenales actiones in heredem nec competere ...

mention in the edict as to the passive transmissibility of the action in the case of necessary deposit. It is likely that the impetus for allowing a remedy against the heir in this case was in fact the introduction of the new action in factum for ordinary deposit. If that remedy was available against the heir ex dolo defuncti it would be absurd not to allow a similar action in the more serious case of necessary deposit.

As regards D.16.3.18, no inference can be drawn from this text concerning the passive intransmissibility of the action in factum for ordinary deposit. The extract, no doubt, is part of a commentary by Neratius on the edict,<sup>45</sup> however, it contains no statement to the effect that only in the case of necessary deposit did an action lie against the heir ex dolo defuncti. There has been some discussion of the effect to be given to the word quoque which appears in the text.<sup>46</sup> If it does in fact refer back to an action discussed earlier in the commentary but which is not mentioned in the text as excerpted, the most plausible suggestion is Taubenschlag's<sup>47</sup>, namely, that reference must have been to an action which lay against the heir ex dolo defuncti in ordinary deposit.

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45. See the chapter on the duration of the action in factum.

46. See the chapter on the duration of the action in factum.

47. Grünhuts Zeitschrift 34 (1907) p.708.

The third argument turns on the question of dolus. Liability in the actio depositi in factum was for dolus alone.<sup>48</sup>

Such an action which punished the wrong of the deceased would, on this argument, have conformed to its penal type and could not have been available against the heir ex dolo defuncti.<sup>49</sup> In this context D.16.3.18 is instructive.

Liability in necessary deposit was also for dolus alone.

Yet, we are told that in that case an action was available against the heir ex dolo defuncti. Furthermore, where there was a number of co-heirs each was liable pro parte hereditaria - exactly as stated in the texts on ordinary deposit discussed in the first part of this chapter.<sup>50</sup>

D.16.3.18 establishes that an action lay against the heir in necessary deposit ex dolo defuncti pro parte hereditaria.

Therefore, the fact that liability in the action in factum for ordinary deposit was for dolus alone is not a fundamental objection to the idea that a similar remedy

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48. Gaius, 4.47.

49. See Gaius, 4.112 quoted in note 44 above.

50. D.16.3.7.1, 9 and 10.

was available against the heir in that case.<sup>51</sup>

The foregoing observations, of course, do not establish that the action in factum was passively transmissible. They merely raise the possibility that it was. We shall now adduce evidence to support this contention, and then, in the light of this evidence, assess the statement of Theophilus that the actio depositi did not lie against the heir.

In the first part of this chapter we discussed a group of texts, D.16.3.7.1, 9 and 10 which deal with the liability of the heir ex dolo defuncti. Was liability to the action in factum or the action in ius at issue in these cases? Both D.16.3.7.1 (Ulp. 30 ed.) and D.16.3.9 (Paul 17 ed.)

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51. Pernice, Labeo 1, p.436 n.45 draws attention to D.44.7.49 (Paul 18 ad Plaut.) Ex contractibus venientes actiones in heredes dantur, licet delictum quoque versetur, veluti cum tutor in tutela gerenda dolo fecerit aut is apud quem depositum est ... Pernice believes that Plautius had assimilated the actio depositi in factum and the actio rationibus distrahendis. The latter was a penal remedy which was passively intransmissible at that time. The implication which Pernice appears to draw is that because of the assimilation the position must have been the same in the action in factum. However, it is neither certain that the actio depositi in factum nor the actio rationibus distrahendis are referred to in the text. It speaks generally in the terms: tutor in tutela gerenda dolo fecerit, whereas the actio rationibus distrahendis lay for actual embezzlement. (D.27.3.2pr. Actione de rationibus distrahendis nemo tenetur, nisi qui in tutela gerenda rem ex bonis pupilli abstulerit) Also this remedy was still passively intransmissible even in the time of Paul (D.27.3.1.23 (Ulp. 36 ed.) [actio] ... in heredem ... non dabitur, quia poenalis est.)

are extracts from the respective commentaries on the edict of Ulpian and Paul. It is accepted that the action in factum formed the basis for the edictal commentaries on depositum<sup>52</sup>, therefore one might argue that it was being discussed in the texts. However, some consideration was also given to the action in ius in the edictal commentaries<sup>53</sup>, so the argument is not conclusive.

In the case of D.16.3.7.1 there is further evidence that it concerned the action in factum. We have seen that the text is commonly thought to be corrupt, especially in the middle section, quamquam ... descendit. On the assumption that it did concern the action in factum, certainly the statement tamen hic dolus ex contractu reiue persecutione descendit is odd. However, we should remember that Ulpian is a late classical jurist writing at a time when deposit had been recognised as a contract for at least sixty years. It is therefore possible that he might speak of dolus arising from 'contract' even when referring to the action in factum; especially in a context where, as here, he wishes to explain why a remedy in which liability was for dolus should be passively transmissible pro parte hereditaria.

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52. Rotondi, Scritti 2, p.31 and p.48; Maschi, op.cit., p.154; Gandolfi, Il Deposito (Milan, 1976) p.38.

53. Lenel, Pal. 2, p.614; Ed. Perpetuum, p.289.



If the allegedly corrupt section of D.16.3.7.1 is genuine the discussion is unlikely to have been of the action in ius. Ulpian takes care to distinguish the actio depositi referred to in the text from a particular group of remedies which were also available ex dolo defuncti. These actions, which were clearly penal<sup>54</sup>, were available pro ea parte quae ad nos pervenit, but the actio depositi is different and lies pro parte hereditaria because the dolus arises from 'contract' [and is not treated as a wrong]. Ulpian must have been moved to distinguish the actio depositi from the 'enrichment' actions because, besides the fact that it lay ex dolo defuncti, it shared some features with that group which, in certain circumstances, allowed it to be assimilated with them, and thus, on the question of the amount for which it lay against the heir, worth distinguishing from them. But, in the case of the actio depositi in ius, a contractual bona fide remedy, its passive transmissibility pro parte hereditaria will have been beyond question, even although it lay ex dolo defuncti. If this remedy was being discussed there is no obvious reason why Ulpian should have wished to stress that it lay pro parte hereditaria<sup>55</sup> and not for enrichment. However, there is more reason to distinguish

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54. Because they lay only for enrichment against the heir and are contrasted with deposit where the dolus arises ex contractu.

55. Strictly, Ulpian places the stress on the fact that the action ex dolo defuncti lies in solidum (for the full amount) as opposed to lying just for enrichment.

the actio depositi from the enrichment actions if the text concerned the action in factum. There is a group of praetorian delicts, of which the actio doli is the obvious example, which, like the praetorian actio depositi were formulated in factum and in which liability was only for dolus. Ex dolo defuncti these actions lay against the heir to the extent of his enrichment<sup>56</sup>, the reason being that the dolus of the deceased was treated as a wrong. But, in the actio depositi in factum we are told that the dolus arises from 'contract' with the effect that against the heir it lay pro parte hereditaria. To speak of dolus arising from 'contract' in the case of the actio depositi in factum, strictly speaking, is incorrect. Yet, Ulpian's purpose in fact was to point out that the effect of dolus in the action in factum was different from those [praetorian] actions in which the commission of dolus amounted to a delict. Ex dolo defuncti the action in factum lay pro parte hereditaria which is the proportion in which contractual actions lie against the heir. This would explain Ulpian's statement that the dolus ex contractu reique persecutione descendit. The effect of dolus in the context of the praetorian actio depositi was the same as that where dolus amounted to a breach of contract.

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56. For the actio doli; D.4.3.17.1 (Ulp. 11 ed.) Haec actio in heredem ... datur dumtaxat de eo quod as eos pervenit.

The problem with founding the above argument on D.16.3.7.1 is that it relies on a part of the text whose authenticity is questioned<sup>57</sup>. However, still stronger evidence that the actio depositi in factum was passively transmissible is provided by D.44.2.22.

D.44.2.22 (Paul 31 ed.) Si cum uno herede depositi actum sit, tamen et cum ceteris heredibus recte agetur nec exceptio rei iudicatae eis proderit: nam etsi eadem quaestio in omnibus iudiciis vertitur, tamen personarum mutatio, cum quibus singulis suo nomine agitur, aliam atque aliam rem facit. Et si actum sit cum herede de dolo defuncti, deinde de dolo heredis ageretur, exceptio rei iudicatae non nocebit, quia de alia re agitur.

The text concerns the problems of consumption of actions with respect to which the basic principles are as follows<sup>58</sup>: there was a rule of the old civil law, bis de eadem re ne sit actio. Where there was a second attempt at litigation on the same matter, the effect of this rule differed depending on the nature of the first action. If it was a iudicium legitimum in personam formulated in ius concepta the praetor refused the second action (denegatio). Consumption in this case was ipso iure. However, if the action was of any other sort, consumption was not ipso iure but iure praetorio by means of the exceptio rei iudicatae vel in iudicium deductae<sup>59</sup>.

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57. Index Intp. See especially, Rotondi, Scritti 2, p.405ff.

58. Gaius, 4.105-109. See also, Wenger, Institutes of the Roman Law of Civil Procedure (trans., Fisk) (New York, 1940) p.175ff; Kaser, Das römische Zivilprozessrecht (Munich, 1966) p.227ff, 292ff.

59. See Gaius, 4.107.

In D.44.2.22 two factual situations are discussed. I proceed with the actio depositi against one heir de dolo defuncti and then I wish to raise an action against the remaining heirs on the same grounds. Secondly, I proceed with the actio depositi against an heir de dolo defuncti and then I raise an action against the same individual de dolo heredis. We are told for both instances that my second claim cannot be met with the exceptio rei iudicatae because in neither case does the rule bis de eadem re ne sit actio operate.<sup>60</sup> In (1) there is a mutatio personarum and in (2) the second action is de alia re.

The important feature of the text for our purposes is the implication that had the second claim been de eadem re consumption would have operated only by means of the exceptio rei iudicatae. If that is the case was the actio depositi in factum or the action in ius under discussion? The action in ius was not only in personam and formulated in ius concepta, but also bona fide<sup>61</sup>; consumption was therefore inso iure. On the other hand, in the action in factum consumption operated by means of the exceptio rei

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60. For the rule to operate there must be identity of res, causa and person; Buckland, Textbook of Roman Law, p.697ff.

61. See Wenger, op.cit., p.167 n.22. The exceptio rei iudicatae vel in iudicium deductae was superfluous in bona fide actions.

iudicatae. Therefore, D.44.2.22 must have been discussing the latter remedy.<sup>62</sup>

The foregoing arguments establish that in classical law the actio depositi in factum lay against the heir ex dolo defuncti pro parte hereditaria. This fact is sometimes conceded; for example, by Taubenschlag.<sup>63</sup> However, even Taubenschlag maintains that when first introduced the action in factum was passively intransmissible. This assertion depends upon two factors: firstly, the conviction that, at least in origin the action was penal; penal actions as a group being passively intransmissible. Such an argument is inconclusive; secondly, the statement of Theophilus that the actio depositi was not available against the heir.

Justinian, Inst., 4.12.1 considers the question of actions which were and were not passively transmissible. The distinction is said to turn essentially on whether the action was delictual or contractual. Thus he says:

J. Inst., 4.12.1 ... est enim certissima iuris regula, ex Maleficiis poenales actiones in heredem non competere, veluti furti ...

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62. But cf, Levy, Konkurrenz 1 (Berlin, 1918) who believes that the exceptio did not apply only in the case of the action in factum. See also, Kaser, Zivilprozessrecht, p.231 who leaves the question open.

63. Grünhuts Zeitschrift 35 (1908) p.132ff.

and continues:

... aliquando tamen etiam ex contractu actio contra heredem non competit, cum testator dolose versatus sit et ad heredem eius nihil ex eo dolo pervenerit ...

We have seen that Theophilus, in his version of the Institutes (4.12)<sup>64</sup> presents the actio depositi as an example of a remedy ex contractu which did not lie against the heir.

There are three main responses<sup>65</sup> to Theophilus's statement. It is assumed that he was referring to the actio depositi in factum and the text is presented as confirmation that in classical law this action was passively intransmissible.<sup>66</sup> Alternatively, it is conceded that Theophilus contradicts clear evidence that in developed law the action in factum was passively transmissible. The argument then advanced is that Theophilus must have been referring to a work of an early jurist - certainly pre-Neratius - in which the action in factum was still regarded as unavailable against the heir. According to this view, the action in factum

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64. See note 38 above.

65. Besides the responses reproduced here, some scholars have referred Theophilus's statement to the action for necessary deposit; for an account, see Taubenschlag, Grünhuts Zeitschrift 35 (1908) p.133 n.12.

66. Karlowa, op.cit., p.1313.

was passively intransmissible when first introduced but not after the time of Neratius.<sup>67</sup>

We can reasonably express surprise at the idea that Theophilus should have chosen an archaic rule, which had not been in operation for hundreds of years, to illustrate a feature of depositum which for him was a bona fide contract. Even assuming that Theophilus were referring to the action in factum we might retort that, like many modern scholars, he drew a wrong inference from the fact that there is no mention in the edict of an action available against the heir in cases of ordinary deposit. However, the matter is not so straightforward.

A comparison of Justinian, Inst., 4.12.1 with Gaius, Inst., 4.112-113, on which the former text is substantially based, is helpful.

Gaius, Inst., 4.112 ... Est enim certissima iuris regula, ex maleficiis poenales actiones in heredem nec competere nec dari solere, veluti furti .... 113. Aliquando tamen ex contractu actio neque heredi neque in heredem competit. Nam adstipulatoris heres non habet actionem, et sponsoris et fidepromissoris heres non tenetur.

In Inst., 4.12.1 Justinian follows Gaius 4.112 almost word for word. In 4.113 Gaius introduces the proposition that, aliquando tamen ex contractu actio neque heredi neque in heredem competit; Justinian still follows Gaius closely.

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67. Taubenschlag, Grünhuts Zeitschrift 35 (1908) p.133f.



They differ, however, in respect of the examples they choose to illustrate the fact that some contractual actions do not lie against the heir. Gaius mentions the cases of the sponsor and fidepromissor whereas Justinian presents the general proposition that where the testator was guilty of dolus no action lay against his heir if he was in no way enriched by the deceased's dolus. It is quite clear that the section cum testator ... pervenerit has been introduced by the compilers of Justinian's Institutes.<sup>68</sup>

Rotondi<sup>69</sup> has convincingly shown that the rule contained in the section, cum testator ... pervenerit flatly contradicts a large number of classical law sources. He also shows that the doctrine expressed in that section had a purely Byzantine origin. In classical law there was a number of contractual institutions in which liability was only for dolus, but, by the time of Justinian, liability in nearly all of them had been relaxed to culpa. A result of this was that the Byzantines formulated the general proposition that dolus as a limit of liability lay outwith contractual actions and was a feature of actions arising ex delicto. It is because of this assimilation between dolus and delict that one finds the rule that in

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68. Rotondi, Scritti 2, p.50.

69. Scritti 2, p.371ff. This is the third of the responses to Theophilus's statement.

actions arising ex dolo defuncti, even where the liability is based on contract, recourse against the heir is only to the extent of his enrichment. The point is that the Byzantines tended to apply rules of delictual actions generally to actions in which liability was only for dolus.

Theophilus illustrates the statement, aliquando tamen ex contractu actio contra heredem non competit with the example of depositum. The reason is that this was the only 'contractual' transaction in which, formally at least, liability remained only for dolus in the time of Justinian.<sup>70</sup> The importance of Rotondi's observation for our purposes is that it shows that Theophilus, while illustrating the passive intransmissibility of contractual actions with the example of depositum, was not reproducing a rule of the action in factum.

We conclude that the arguments advanced to show that the actio depositi in factum was passively intransmissible are weak. There is clear evidence that in classical law ex dolo defuncti it lay against the heir pro parte hereditaria. As regards the view that it was passively

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70. Rotondi, Scritti 2, p.371ff argues that the compilers of the Digest were concerned to combat the Byzantine idea that actions ex contractu brought ex dolo defuncti were available only in id quod pervenit. D.16.3.7.1 is an example where they expressly do this.

intransmissible when first introduced but not in developed law, the only basis for such an hypothesis is the conviction that in origin it was a penal remedy which conformed to that group of actions in not being available against the heir except possibly to the extent of his enrichment.

CHAPTER XI

THE LIABILITY OF THE HEIR EX DOLO SUO

## THE LIABILITY OF THE HEIR EX DOLO SUO

As part of the discussion of the position of the heir sued ex dolo defuncti we considered D.16.3.9 (Paul 17 ed.) which contrasted the heir's liability pro parte hereditaria in this case with his liability in solidum where he was sued ex dolo suo. In an earlier chapter we discussed the position of joint depositors and concluded that they were correally liable except that in the bona fide actio depositi in ius there is evidence to suggest that from late classical law a regime of simple solidarity was operated. In this section we consider the liability of the heir ex dolo suo; firstly because the main source, D.16.3.22 (Marcellus), contains a statement to the effect that two heirs might be held liable in partes for their own dolus. It is important to determine how this can be reconciled with Paul's statement in D.16.3.9 that such heirs were liable in solidum, otherwise our earlier analysis of Paul's text might itself be open to doubt. Secondly, in the latter half of D.16.3.22 we are told that the heirs [ex dolo suis] in solidum conveniri poterunt, ac si ipsi servandum suscepissent. In view of this assimilation between the position of heirs and depositors we must determine whether the sources on the liability of a plurality of heirs tell us anything further about the legal position of joint depositors.

D.16.3.9 (Paul 17 ed.) In depositi actione si ex facto defuncti agatur adversus unum ex pluribus heredibus, pro parte hereditaria agere debeo: si vero ex suo delicto, pro parte non ago: merito, quia aestimatio refertur ad dolum, quem in solidum ipse heres admisit.

D.16.3.22 (Marcellus 5 dig.) Si duo heredes rem apud defunctum depositam dolo interverterint, quodam utique casu in partes tenebuntur: nam si diviserint decem milia, quae apud defunctum deposita fuerant, et quina milia abstulerint et uterque solvendo est, in partes obstricti erunt: nec enim amplius actoris interest. Quod si lancem conflaverint aut conflari ab aliquo passi fuerint aliave quae species dolo eorum interversa fuerit, in solidum conveniri poterunt, ac si ipsi servandam suscepissent: nam certe verum est in solidum quemque dolo fecisse et nisi pro solido res non potest restitui. Nec tamen absurde sentiet, qui hoc putaverit plane nisi integrae rei restitutione eum, cum quo actum fuerit, liberari non posse, condemnandum tamen, si res non restituetur, pro qua parte heres exstitit.

D.16.3.22 tells us that two heirs might be held liable in partes for their own dolus which, prima facie, contradicts Paul's assertion in D.16.3.9 that ex suo delicto the heir is liable in solidum (pro parte non ago). In the consideration of this question there are two basic points to be dealt with; (a) we must decide whether the part of D.16.3.22 which alleges the liability of the heirs in partes is genuine. We should note that it is only in a certain case (quodam utique casu) that the heirs are said to be

liable in partes. This implies that the solidary liability of the heirs referred to in the second part of D.16.3.22 was the normal rule; an inference which is supported by D.16.3.9. The special nature of the situation giving rise to the liability in partes suggested by the words quodam utique casu might argue in favour of the authenticity of the first part of the text. If this is found to be the case we must decide, (b) what were the factors which caused the extent of the heirs' liability ex dolis suis to be varied in this way.

In dealing with the first issue, we shall begin by looking at the objections to the text raised by Guarneri Citati.<sup>1</sup> We choose this scholar as representative of the school which regards the first half of D.16.3.22 as having been interpolated with the purpose of expunging the heirs' solidary liability in favour of the liability in partes which we now find.<sup>2</sup>

The facts of the case, as seen by Guarneri Citati, are that two heirs divide a sum of 10,000 which has been

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1. Studi sulle Obbligazioni Indivisibili nel Diritto Romano, Ann. Pal. 1921, p.34ff.

2. Also, inter alia, Sorrentino, La Responsabilita degli Eredi pel Dolo Defunto nell'actio depositi nel Diritto Romano Classico (Rome, 1903) p.26ff; Rotondi, Scritti 2 (Milan, 1922) and Beseler, Romanistische Studien, ZSS 46 (1926) p.83ff at p.95.



deposited with the deceased and remove 5,000 each. As opposed to the position discussed in the second half of the text where the heirs are said to interfere with a lanx, in this instance, in partes tenebuntur ... in partes obstricti erunt. The reason for the different solution given by Marcellus in each case seems to depend, according to Guarneri Citati, on the different nature of the deposited property which is indivisible in the second example (lanx) but divisible in the first. Thus, since in the latter case the deposit is divided between the two heirs, the interversio of each pertains only to one half of the whole which would explain why they are liable in partes.

This apparent reason for distinguishing between the two cases is not seen as satisfactory by Guarneri Citati. He expresses surprise at the justification given by Marcellus for the individual heir's liability in partem: nec enim amplius actoris interest; and at the fact that this liability in partem is subordinated to the consideration that both heirs are solvent: et uterque solvendo est. Binder<sup>3</sup> has suggested that et uterque solvendo est is an addition, but Guarneri Citati argues that the phrase cannot be treated in isolation because the condition of the heirs'

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3. Die Korrealobligationen im römischen und im heutigen Recht (Leipzig, 1967), p.101.

solvency is closely tied up with the justification nec enim amplius actoris interest. The reasoning behind the justification in the text as it stands, based as it is on the fact that the property has been divided, is that the pursuer has no greater interest with regard to his claim against each individual heir than the part which the latter has in his possession, provided, that is, that both heirs are solvent. To excise et uterque solvendo est by itself would mean that the liability in partes was dependent simply on the pursuer's interest per se, irrespective of whether each heir was solvent or not, and yet, according to Guarneri Citati, the pursuer's interest was never a factor which determined whether in classical law his action lay in partem or not. Furthermore, with Binder's excision the text would state the contrary of what was the position in fact because the pursuer did have an interest in having an action in solidum rather than claims in partes against the heirs in order to avoid by this means the danger that one of the debtors might be insolvent. Therefore, if, following Binder's view, Marcellus were simply to say that the action lies in partem because the pursuer's interest is no greater, it would not be a true representation of the position in fact. So, as far as Guarneri Citati is concerned, not only is the first half of the text unsatisfactory in its present form, but also the limited alteration suggested by Binder is to be rejected. Because he thinks that the two phrases with which we have been dealing are complementary, and yet

because he also sees them as unauthentic, Guarneri Citati's solution to this part of D.16.3:22 is to reject them both. He suggests that originally the co-heirs were said to be liable in solidum notwithstanding the fact that the property was divisible and that the interversio (i.e. the dolus) of each heir was in relation only to a part of it. The particular emendations which he suggests are as follows: in place of in partes stood in solidum, while in place of quodam utique casu there was perhaps etiam hoc casu, and it was in fact Justinian, he argues, who introduced the idea of liability in partes subject to the condition that both heirs be solvent.

The second part of the text where the heirs' solidary liability is affirmed is seen by Guarneri Citati as forming a parallel with the first. Thus, he believes the text as a whole said that in the case of the divided money the heirs were liable in solidum just as in the case of the lanx. The discussion as it relates to the lanx he treats as essentially genuine. Suspect, however, in the sentence nam certe verum ... non potest restitui, is the term in solidum appearing in the phrase in solidum dolo facere which, according to Guarneri Citati, sounds corrupt. Although he does not say as much we can assume that he is objecting here to the idea of dolus committed in solidum<sup>4</sup>.

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4. See the discussion of D.16.3.9 in the chapter on the liability of the heir ex dolo defuncti.

Finally, the concluding sentence of the text, nec tamen absurde .... pro qua parte heres exstitit, he dismisses as an addition.

Besides the fact that later we will show that Guarneri Citati misunderstands the significance of the statement that the heirs in partes obstricti erunt, the form of the text speaks against his thesis. Normally the heir ex dolo suo was liable in solidum<sup>5</sup>, therefore, where consideration is given to a special case (quodam utique casu) we might reasonably find that this degree of liability is varied, as is the case in the present reading of the text. Guarneri Citati suggests that the words etiam hoc casu stood in the place of quodam utique casu. If this emendation is accepted the facts of the first part of D.16.3.22 are presented, not so much as a special case resulting in the variation of the heirs' liability, but as special facts notwithstanding which the solidary liability of the heirs is affirmed. However, there are no good grounds, beyond Guarneri Citati's conviction, to suggest that the text was altered in this way. The present form of the text must stand in the absence of strong arguments to the contrary. Furthermore, it is worth pointing out that the Italian scholar believes that the distinction between divisible and indivisible property was only of

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5. See Litewski, Studien zur Verwahrung im römischen Recht (Warsaw/Krakov, 1978), p.13ff.

relevance in the time of Justinian. Yet, his interpretation of the text means that there must at least have been some difficulty in classical times concerning the position of heirs where deposited property was divided in the manner discussed; otherwise there would have been no need for Marcellus to underline, as Guarneri Citati argues he did, that even in the case of the divided 10,000 the heirs' liability was solidary.

The alternative approach to the text is to regard it as basically genuine. We shall now look at the arguments of a group of scholars who, in one way or another, all trace the heirs' liability in partes to the division of the 10,000.

As far as the facts of the case are concerned Litewski<sup>6</sup>, like Guarneri Citati, believes that in the first instance the discussion concerns a sum of 10,000 deposited with the deceased of which the two heirs embezzle 5,000 each. However, Litewski takes as genuine the rule that in this case the heirs are liable only in partes. He concedes, as is shown by the second example discussed and the fact that the first is a special case, that the heirs' liability ex dolis suis was normally solidary. Nevertheless, a tendency can be seen, he suggests, towards a limitation of solidarity

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6. Op.cit., p.13ff.

in favour of division as early as classical law where the property embezzled had been divided between the heirs. Therefore, as far as he is concerned, by this time, where the property was divisible and where it had in fact been divided between the dolose co-heirs, they were held liable only in part [by at least some jurists]. However, the fact that the liability in partes of the heirs was subject to the condition, et uterque solvendo est, is regarded as an interpolation by Litewski on the grounds that such a factor as a consideration determining the extent of the heirs' liability was unknown in classical law. Whereas his approach to the phrase et uterque solvendo est is unequivocal, Litewski sees a problem in the phrase nec enim amplius actoris interest. He regards as the basis of the decision that the heirs are liable in partes the fact that the property has been divided between them. How then does the explanation given in the text concerning the extent of the pursuer's interest fit in with this? If the words et uterque solvendo est were genuine this would give meaning to the nec enim ... interest phrase, because, on the assumption of the heir's liability in partes, the pursuer's claim against each in partem might indeed be construed as the extent of his interest, provided both heirs were solvent. However, Litewski follows the generally held view that et uterque solvendo est is interpolated. Once this phrase is removed he is left with a conflict between his conviction concerning the basis of the decision

(i.e. the division of the property) and the justification given in the text which states that the extent of the pursuer's interest is the deciding factor. Litewski points out that the position of the depositor is better where he has a claim in solidum against each heir, a fact which does not square with the statement in the text that each heir is liable in partem because the pursuer has no greater interest. For this reason Litewski finally comes down in favour of the view that nec enim amplius actoris interest is an addition, though, to begin with, he expressed doubts as to the certainty of this objection.

In contrast to the first part of the text, the second concerns the embezzlement of an indivisible object where the normal rule of solidary liability applied. This part is regarded as genuine by Litewski, except for the section et nisi pro solido ... fin which he believes to be Justinianic. He criticises the words et nisi pro solido res non potest restitui on the grounds that there are no other cases in classical law where the degree of liability of a plurality of heirs of a depositor is said to be dependent on the fact that the object could be given back only as a whole.<sup>7</sup> He criticises nec tamen ... fin because these words introduce a limitation on the heirs' solidary liability by saying that in the event of a failure to return the property the defender could only be condemned pro parte hereditaria. This

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7. See also, Riccobono, *Communio e Comproprietà, Essays in Legal History* (Oxford, 1913), p.33ff at p.106 n.3.



contradicts what is said earlier in the text and what is confirmed by other sources that in classical law the heir's liability ex dolo suo was solidary.

Binder<sup>8</sup> presents D.16.3.22, which discusses the liability of heirs, as part of his thesis concerning the liability of a plurality of depositors and commodatees. According to him, the rule that these parties were liable in solidum was not an absolute one<sup>9</sup>, but one contingent on the particular nature of the obligation to restore the property. Where the obligation was indivisible liability was solidary; however, where the obligation was divisible and divided the debtors were only liable in partes. Whether the obligation to restore was divided depended firstly on whether the actual property deposited or loaned was divisible and secondly on whether it was in fact divided between the depositors or commodatees. Binder believes he can utilise D.16.3.22 to support this thesis because, although the text merely discusses the position of a plurality of heirs, they themselves are guilty of dolus which, according to Marcellus, has the result that the heirs are treated as if they were the original depositors (ac si ipsi servandum suscepissent).

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8. Op.cit., p.98ff.

9. We saw in our discussion of D.45.2.9<sup>pr.</sup> and D.16.3.1.43 that the generally accepted view was that solidarity was the normal consequence of a deposit made jointly with a plurality of depositors.

Marcellus discusses two cases in D.16.3.22: the 10,000 considered in the first part of the text Binder thinks was divided between the heirs before the embezzlement. In such a case, as a general rule, each heir, he maintains, was liable only for the part of the deposit which he had received. Therefore where, as in D.16.3.22, the heirs each took 5000 from the 10,000, it follows that each was liable only for what he subsequently embezzled from his half share of the original deposit. Solidarity is excluded in this case because the 10,000 was divisible and was divided between the heirs on succession.

The contrast between this case and the one which follows, Binder believes, turns on the fact that the property referred to in the second part of D.16.3.22 was indivisible; return of part only was impossible and the liability of the heirs as a consequence was solidary. Marcellus, Binder maintains, expressly states this as the basis of the solidary liability in the sentence, nam verum est in solidum quemque dolo fecisse, et nisi pro solido res non potest restitui which he regards as genuine.

Levy<sup>10</sup> disputes both Binder's thesis that solidarity in the actiones depositi and commodati arose as a result of an indivisible obligation to restore the property and the idea

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10. Die Konkurrenz der Aktionen und Personen im klassischen römischen Recht (Berlin, 1918), p.213 n.3.

that this is supported by D.16.3.22. As regards the first case discussed in the text Levy believes that the heirs divided the 10,000 and removed 5,000 each. The special nature of this case (quodam utique casu) and the reason why the heirs are only liable in part, he argues, depends upon the relation between dolus and the object deposited. Where the object is divisible and is in fact divided, the liability of each heir is limited to what he took because it is only with respect to this that he was guilty of dolus.

The arguments of Binder and Levy have the feature in common that they both identify the fact that the 10,000 was divisible and divided between the heirs as explaining the latter's limited liability. The difference between them is that whereas Binder views the case where the property is divisible and divided as giving rise to a divided obligation to return and consequent liability in partes, Levy traces this liability, not to conceptions such as the obligation to restore, but to the relation between the individual heir's dolus and the deposited property.

The differences between the interpretations of Litewski and Levy in the final analysis are less great. Litewski believes that the liability in partes was an innovation where solidarity previously had applied. Therefore, at one time, even where the heirs had divided the money they were each liable for the full 10,000. Clearly Litewski does not trace their liability, as Levy does, directly to the

relation between dolus and the property deposited. However, once it was decided that the heirs should merely be liable in partes, they could only be sued in respect of the property which they actually held; i.e. for the 5,000 which was the amount in respect of which each was guilty of dolus.<sup>11</sup>

The three above mentioned scholars all trace the heirs' liability in partes to the fact of the division of the 10,000. In doing this they are undoubtedly correct. However, none of them grasps the proper significance of the division with the result that their interpretations are unsatisfactory. We shall now present a different explanation of the text and then, in the light of this, offer a detailed criticism of the interpretations of these scholars.

We begin with a preliminary observation on terminology. Binder says, 'mehrere Erben des Depositars, welche das depositum unterschlagen haben, sollen nach der 22, quodam utique casu, nur pro parte haften'.<sup>12</sup> The expression pro parte denotes the heir's liability pro parte hereditaria<sup>13</sup> which in the context of a discussion of his liability in

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11. Litewski does not make clear what the motivating factor for the creation of liability in partes was. That is, did the innovation originate in an appreciation that each heir was guilty of dolus only in respect of 5000, or, alternatively, was the basis for the limited liability the mere fact of division itself?

12. Litewski, op.cit., p.13 also uses the term pro parte.

13. See D.16.3.9.

the actio depositi arises ex dolo defuncti and normally stands in contrast to his solidary liability ex dolo suo.<sup>14</sup> The first part of D.16.3.22 in fact makes no mention of liability pro parte, but refers to the liability of the heirs as being in partes (in partes tenebuntur ... in partes obstricti erunt). However, as Binder's argument progresses it becomes clear that what he means in this case by the heirs' liability pro parte is a liability of each for the amount which he has removed from his share of the deposit. As a conception this is quite different from an heir's possible liability in proportion to his share of the inheritance (pro parte hereditaria).

The issue with which Marcellus was dealing in D.16.3.22 can be better appreciated by looking first of all at D.16.3.9. The normal position of the heir of a deceased depositor was that his liability was divided.<sup>15</sup> D.16.3.9, D.16.3.7.1 and effectively the first sentence of D.44.2.22 state that the heir, ex dolo defuncti, was liable pro parte hereditaria. In addition to this D.16.3.9 tells us that the divided liability of the heir ex dolo defuncti is to be distinguished from his solidary liability ex dolo suo. So much is clear. The first problem with which we are

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14. Cf. D.16.3.9 and D.16.3.7.1.

15. See Levy, op.cit., p.213 n.3.

presented, however, is this: what was the position where two heirs of a deceased depositor were themselves guilty of dolus? No certain answer is given to this question in D.16.3.9. The purpose of that text was to contrast the position of an individual heir who is sued ex dolo defuncti with the liability of an individual heir ex suo delicto.<sup>16</sup> In the former case an action lies against all the co-heirs and the individual heir is liable pro parte hereditaria. However, in the latter case an action lies only against the heir who has actually been guilty of dolus. D.16.3.10 tells us that no action lies against his innocent co-heirs. Therefore, the dishonest heir referred to in D.16.3.9 must necessarily be liable in solidum (for the full amount) as he is the only person against whom an action can be brought. It does not necessarily follow from this statement found in D.16.3.9 that where two heirs were themselves guilty of dolus each of them would be liable in solidum, because the solidary liability of the individual heir mentioned in D.16.3.9 may have been determined simply by the fact that he was the only heir who had been dishonest. Nevertheless the clear inference to be drawn from D.16.3.22 is that two heirs who were themselves guilty of dolus were each liable in solidum. The text concerns itself specifically with the position of two dishonest heirs and, given that their liability in partes is presented as a

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16. See the discussion in the chapter on the liability of the heir ex dolo defuncti.

special case, it follows that their solidary liability is likely to have been the normal rule (in solidum conveniri poterunt).

At this point we can provisionally identify what the factors were which determined the degree of liability of the heir of a depositee. Firstly this might have been affected by how many heirs there were. Where there was only one heir he was liable for the whole amount even although he was sued ex dolo defuncti.<sup>17</sup> However, the principal factor affecting the extent of the heir's liability was dolus. On account of the dolus of the deceased his liability was pro parte hereditaria, but where he himself was dishonest he was liable in solidum. But there is a further complication concerning the position of the heir ex dolo suo. We have seen that where two heirs acted dishonestly the implication to be drawn from D.16.3.22 was that each was liable in solidum. Now, if at all, is this altered if the two heirs act independently? For example, suppose that property is innocently divided between two heirs of a deceased depositee as part of the hereditas and one of them then returns home to Asia while the other remains in Rome. If both subsequently refuse to return the property which they are holding, is each still liable for the whole amount originally entrusted to the deceased depositee?

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17. See D.16.3.7.1.



In similar circumstances the position of two joint depositors is clear. Let us imagine that 10,000 is entrusted to them jointly which they divide, and then they subsequently refuse to return their respective shares. We saw in our discussion of D.16.3.1.43 and D.45.2.9pr. that there was no reason to question the generally accepted view that solidarity was a natural consequence of a deposit made jointly with a plurality of depositors. Equally, Levy<sup>18</sup> has pointed out that there is absolutely no reason to suppose that the solidary liability in that case depended on the property not having been divided between the depositors. Therefore we can be certain that each depositor will have been liable for the whole 10,000 even although they divided it between themselves and each subsequently acted independently of the other in embezzling his share. The important point here is that the deposit was originally made with them jointly and it was this which was the crucial factor determining their individual liability for the full 10,000. Precisely by receiving the 10,000 jointly both depositors assumed responsibility for the full amount entrusted to them.

As regards the case of a plurality of dishonest heirs of a deceased depositor the position is different. According to the principles of universal succession the liability of heirs for the obligations incurred by the deceased is

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18. Op.cit., p.213 n.3.

divided between them. However, as observed by Levy,<sup>19</sup> where the heirs themselves are guilty of dolus they usurp the position of the deceased. But, in the first part of D.16.3.22 we are told that where the heirs divided the property entrusted to the deceased they were liable in partes. The reason for this, it is submitted, is that the heirs were never deemed to hold the money jointly. As we shall see, only on this assumption are certain parts of the text explicable. On the other hand, as we are told in the second half of D.16.3.22, where the property entrusted to the deceased was indivisible the heirs were liable in solidum. In this case precisely because the property was indivisible the heirs were deemed to hold it jointly and therefore each was liable for the full amount originally entrusted to the deceased. Certainly Marcellus does not state why the division of the property between the heirs should affect the extent of their liability in this way. However, the argument that the division of the property was regarded as determining whether or not the heirs held the property jointly is not only consistent with D.16.3.22, but indeed offers the only plausible explanation of the present form of the text which in its essentials shows no sign of interpolation.

At this point we should look again more closely at the terminology which we have been using. In the previous

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19. Op.cit., p.213 n.3.

paragraph a contrast is made between the position of two heirs depending on whether they had or had not divided the property between them; their liability was in partes or in solidum. What does this expression in partes really mean? Firstly we agree with Binder that it signifies a liability of each heir for what he himself has embezzled from the original 10,000. But we can go further than this. We have argued that where the property left with the heirs was divided between them they were not treated as having held that property jointly; hence their liability in partes. Effectively what this means is that the two heirs are treated as if they were holding two separate deposits. If this is so the expression in partes cannot be distinguished as clearly from the expression in solidum as we suggested it might. In relation to the share which each heir takes from the original sum left with the deceased he is liable in solidum. The point is that in ordinary circumstances<sup>20</sup> his share is in fact a separate deposit with regard to which he is liable for the whole amount which he has embezzled. The expression in partes tenebuntur is not used in the text to denote a special category of liability but simply means that each heir is liable only for a part of the original sum left with the deceased. It is the original sum which is the standard against which the liability in partes of the individual heirs is assessed.<sup>21</sup>

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20. Complications are caused by et uterque solvendo est ... see post.

21. See also Gaius 3, 121 where the expression in partes is used to denote a liability for a part of the original debt owing.

Support for this particular point and for our general argument which distinguishes the two halves of D.16.3.22 by looking to the question whether the heirs were treated as holding the property jointly or not is found in the sentence nec enim amplius actoris interest for which, to date, no scholar has found a convincing explanation and which, as a result, is always dismissed as an interpolation. However, if each of the heirs is regarded as holding a separate deposit we see that the statement makes perfect sense because the interest of the pursuer can be no greater than that part which is held by the heir whom he is suing.

Once we have established that even where the heirs divided the property entrusted to the deceased their liability with respect to their share was solidary, we are in a position to consider the statement in solidum conveniri poterunt, ac si ipsi servandum suscepissent which was made by Marcellus when dealing with the case of the heirs who had received the indivisible property. It is clear that we have to assess this statement against the liability in partes referred to earlier in the text. The term in solidum means simply that a defender is liable for the full amount; this is illustrated by the opening statement in D.16.3.7.1 where Ulpian says, datur actio depositi in heredem ex dolo defuncti in solidum . Here the heir is being sued ex dolo defuncti in which case, in principle, his liability is pro parte hereditaria. However, because he is the only heir of the deceased the action lies against him for the full

amount (in solidum) in so far as his share is the complete inheritance. It is therefore possibly significant that Marcellus, in the second part of D.16.3.22, refers to the action lying in solidum against the two heirs 'as if they themselves had undertaken the deposit'. The words ac si ipsi servandum suscepissent should be taken as denoting a quality of solidary liability (i.e. correality or simple solidarity) in contrast to the solidary liability referred to in the expression in partes tenebuntur. The difference is that the heirs in the case of the indivisible property are liable as if they were the original depositors; that is, as if the deposit had been made with them jointly. They can be sued individually for the full amount which was deposited. The heirs in the case of the divisible property, however, while liable in solidum, can be sued only for the full amount of their share because they were not treated as having held the original deposit jointly. Rather, they hold two separate deposits of 5,000.

Applying this analysis of the text to Binder's general thesis we see that it is untenable. He suggests, on the basis of D.16.3.22, that the solidary liability of a plurality of depositors [and commodatees] depended on the indivisible nature of the obligation to restore the

deposited property.<sup>22</sup> Thus, where the deposited property was divided, he argues that the liability of the defenders was pro parte. In fact, however, we have seen that even where the property was divided the liability of the heirs was solidary, the important point being that the shares taken by the heirs were construed as two separate deposits. Therefore, one cannot argue from the case of dishonest heirs considered in D.16.3.22 generally to that of two dishonest depositees. The depositees receive the property jointly from the depositor; the heirs, at least where the property is divided between them, do not.

One further observation remains to be made on Binder's argument. He says that the heirs divided the 10,000 before the embezzlement. Yet the inference to be drawn from the first part of D.16.3.22 is that the division of the 10,000 itself constituted the embezzlement. However, we should note that whether the heirs were dishonest or not when they divided the money does not alter the issue because they become liable only when, due to their dolus, they fail to

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22. In this context Levy has pointed out that neither Ulpian nor Celsus in D.13.6.5.15 give the least consideration to the idea of an indivisible obligation to restore when discussing the solidary liability of commodatees. Similarly nothing is said about such a conception by Papinian in D.45.2.9pr. nor Ulpian in D.16.3.1.43 when dealing with the solidary liability of joint depositees. Levy correctly represents the approach of these jurists when he says that the res referred to in the texts does not signify indivisible property.

return what they had received.<sup>23</sup> Equally, to refer to the example which we put earlier concerning the heirs who respectively returned to Asia or remained in Rome, for the same reason it does not matter whether they acted innocently or not when they first divided the money. They were treated as holding two separate deposits in all cases once they had divided the property left with the deceased.<sup>24</sup>

Litewski, we saw, believes that the liability in partes referred to in the first part of D.16.3.22 was an innovatory move by Marcellus who wished to do away with the defenders normal solidary liability in cases where the deposited property had been divided between them. However, Litewski misunderstands the significance of the statement that the heirs are liable in partes. The term does not refer to a category of liability distinct from solidarity. It means simply that the individual heir is liable only for a part of the original 10,000 because each is deemed to hold his share as a separate deposit. In relation to his share each heir is still liable in solidum. Certainly if the heirs were deemed to hold the 10,000 jointly each would have been liable for the whole amount irrespective of whether or not it had been divided between them.

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23. Cf. Gaius 4.47.

24. Subject to the exception et uterque solvendo est; see post.



Levy traces the heirs' liability in partes to the relation between the individual's dolus and the deposited property; each heir is guilty of dolus only with respect to his share of the original 10,000. Support for this approach can be drawn from the statement nam certe verum est in solidum quemque dolo fecisse because it suggests that the solidary liability depends upon the question of dolus, the expression dolus in solidum being used because the dishonest conduct relates to the whole property. There is arguably a clear inference to be drawn from this to the first case that the liability in partes turns on the fact that the individual heir's dolus relates only to a part of the property. However, there is one obvious objection to the idea that the nam certe verum ... fecisse clause should be taken as support for the suggestion that the two cases turned on the question of dolus alone and that is that it is joined to the statement et nisi pro solido res non potest restitui which imports a further factor distinguishing the cases. But there is in fact a body of opinion<sup>25</sup> which regards the latter statement as interpolated which would obviate this difficulty. Our next task therefore is to determine the authenticity of et nisi pro solido res non potest restitui; indeed we must go further because there are those, such as Guarneri Citari<sup>26</sup>, who also regard the

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25. See Guarneri Citati, op.cit., p.35 n.2 and the scholars whom he cites. Also, Litewski, op.cit., p.15.

26. Op.cit., p.40ff.

term in solidum as an intrusion within the clause nam certe verum ... fecisse.

The statement et nisi pro solido res non potest restitui introduces the idea that a factor determining the heirs' solidary liability was that they could return the property only as a whole. This follows on the declaration made earlier that these heirs were liable in solidum 'as if they themselves had undertaken the deposit'. Yet Litewski<sup>27</sup> correctly points out that there is no indication elsewhere that solidarity in classical law was dependent on the ability of the defender to make restitution only in full. Also of note in this context is the remainder of D.16.3.22, nec tamen ... heres exstitit. In so far as this continues the discussion of restitution it seems likely that it and the words et nisi ... restitui should be taken together.<sup>28</sup> But, besides the consideration already mentioned that restitution as a factor determining solidarity was foreign to classical law, the clause nec tamen ... heres exstitit in fact contradicts the declaration of solidarity (in solidum conveniri poterunt) which it follows.<sup>29</sup> It states that in the event that the property was not returned the heir should be condemned pro parte hereditaria! This, as representative of classical law, is extremely odd and hence

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27. Op.cit., p.15.

28. See Guarneri Citati, op.cit., p.35 n.2 and Riccobono, op.cit., p.106 n.3.

29. Litewski, op.cit., p.15.

the view that et nisi pro solido heres exstitit is an addition is best affirmed.<sup>30</sup>

As regards Guarneri Citati's objection to nam certe verum est in solidum quemque dolo fecisse that the term in solidum has been added, this is quite consistent with his thesis that the heirs referred to in the first part of the text were also held to be solidarily liable (each for the full 10,000). If this were so we might indeed expect, as he suggests, a statement simply along the lines of nam verum est quemque dolo fecisse<sup>31</sup>. The addition of the term in solidum in this case would have no point. However, we have already rejected Guarneri Citati's interpretation of the first part of the text.

In support of the authenticity of the term in solidum in D.16.3.22 we should refer back again to D.16.3.9 where Paul concludes his discussion by saying, ... aestimatio refertur ad dolum, quem in solidum ipse heres admisit. The term in solidum is used in this statement to denote a certain degree of dolus, and a reference to degrees of dolus was required because Paul was comparing the position of an individual dolose heir with that of his innocent

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30. It is a consequence of et nisi ... heres exstitit that while the intentio would be in solidum, the condemnatio would be pro parte. This is generally thought to be a Byzantine innovation; see Rotondi, op.cit., p.129 n.3.

31. Op.cit., p.41.

co-heirs.<sup>32</sup> The former was said to be wholly guilty of dolus because his co-heirs were all innocent. Equally, if we accept that in D.16.3.22 there is a contrast between the liability of the heirs in partes and their liability in solidum, the same form of argument applies. In the second half of the text the heirs are dishonest with respect to the whole property while in the first half they are individually dishonest only with respect to a part of it. A comparison in degrees of dolus (degrees of dolus being conceived in terms of the proportion of the property to which it relates) is implicitly being made which explains the presence of the term in solidum in the second half of the text.

The arguments which we have advanced to date show that Levy's suggestion that the two cases in D.16.3.22 are to be distinguished on the question of dolus still stands. We must ask, however, whether this distinction turns on the question of dolus or whether the fact that the dolus is conceived as relating only to a part of the property on the one hand but to the whole property on the other is simply the result of a decision made on other grounds. If we refer to the case of two depositors who have received property jointly, each of them can be sued for the full amount even although his dolus relates only to a part of the deposit.

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32. See the discussion of this text in the chapter on the liability of the heir ex dolo defuncti.

Therefore the case of the two heirs who divide the 10,000 is to be distinguished from a similar case of two depositors as they (the heirs) are simply liable in partes. It is not on the question of dolus that these cases differ but on the fact that once the heirs have divided the money they are not thought to hold jointly the whole amount originally deposited. Levy, it is submitted, identifies the fact that the dolus of the heirs relates only to their share of the divided money but not the reason why this results in their liability being in partes.

The final question to consider is the status of the requirement that both heirs be solvent (et uterque solvendo est) if they are to be held liable in partes. This is generally regarded as an interpolation; in particular it is seen as an unsuccessful application of the beneficium divisionis to this case of deposit.<sup>33</sup> The beneficium divisionis was a procedural device introduced by Hadrian whereby a fideiussor could require that he be made liable for no more than the amount of the debt divided by the number of sureties who were solvent at the time that the proceedings were brought.<sup>34</sup> This device has to be viewed against the background that a fideiussor was held to be correally liable, that is, he could be sued for

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33. See especially, Binder, op.cit., p.100f; Levy, op.cit., p.213 n.3 and Litewski, op.cit., p.14.

34. Thomas, Textbook of Roman Law, p.337ff; also cf. Gaius, 3.121.

the full amount of the debt and had no right in law against his co-sureties. Et uterque solvendo est is regarded as a spurious application of this device to D.16.3.22 because the heirs to whom it applied were only liable in partes from the very start.<sup>35</sup> They were not liable in solidum as was the fideiussor and hence had no need of this concession embodied in the beneficium divisionis.

We have argued that the heirs in the first part of D.16.3.22 were regarded as holding two separate deposits. Strictly speaking this means that they should be sued only for the amount of the deposit which they separately hold. The difficulty associated with this position is that it would then be open to the heirs unilaterally to change the incidence of liability under the contract by dividing the original deposit. Suppose that one heir embezzles 1000 and the other heir 9000, and then the latter becomes insolvent. Does this mean that the depositor can recover only 1000? The requirement et uterque solvendo est should be seen as a simple solution to this problem, to be distinguished from the beneficium divisionis in so far as that was a concession to the fideiussores while this was a concession to the depositor. Thus, if there were two heirs and one was insolvent, he

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35. Litewski, op.cit., p.14.

could sue the other for the full amount originally deposited.<sup>36</sup>

In the preceding pages we have been concerned with explaining Marcellus's comparison of the heirs' liability ex dolis suis quodam utique casu in partes with their liability in solidum. We have concluded, (1) that D.16.3.22 is genuine except for the concluding part, et nisi ... heres exstitit which deals with restitution, and (2) that the two halves of the text are to be distinguished on the grounds that in the first, the heirs were not seen to hold the 10,000 jointly because it had been divided between them, while in the second, they were regarded as necessarily holding jointly property which was indivisible. There is no reason to assume that heirs of a depositor necessarily held jointly the property entrusted to the deceased.

The above conclusions allow us to identify more clearly the factors which determined the degree of liability of heirs of a depositor. Earlier we said that their liability was affected firstly by how many heirs there were. So, for example, where an individual heir was sued ex dolo defuncti, in principle he was liable only pro parte hereditaria. However, as he took the whole inheritance he was in fact liable for the whole debt incurred by the

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36. We are not told what the position would be if there were three heirs and one was insolvent.



deceased (in solidum; D.16.3.7.1). But clearly, if there were two heirs liable ex dolo defuncti who took equal shares in the inheritance each was only liable for half of the debt of the deceased. Secondly, the liability of heirs was affected by the question, who was guilty of dolus, the heir himself or the deceased? Ex dolo defuncti the heir was liable pro parte hereditaria (D.16.3.7.1; 9), but ex dolo suo he was liable in solidum (D.16.3.9; 10; 22). However, on the basis of D.16.3.22 we must add the further consideration that ex dolis suis, where property was divided between a number of heirs they were liable in partes in relation to the whole amount originally deposited, but where they held the property jointly they were liable in solidum.

The second theme with which this section was to be concerned was whether D.16.3.22, which deals with the liability of a plurality of heirs, tells us anything further about the legal position of joint depositors. In this context our attention focuses upon the statement that the heirs in solidum conveniri poterunt, ac si ipsi servandum suscepissent. We need to determine whether there is any indication in the text as to the content of the heirs' solidary liability here, in particular whether their liability was correal or simply solidary. Because in this instance their positions were assimilated, any conclusions we reach with respect to the solidary liability of the heirs would apply also to original depositors.

We are told that the heirs are liable in solidum 'as if they themselves had undertaken the deposit', but this tells us nothing about the nature of the solidarity in question. The only possible help which D.16.3.22 gives on this point turns on the requirement et uterque solvendo est in relation to the liability of the heirs in partes. This suggests that if the depositor raises a claim in partem against one of the heirs who turns out to be insolvent he can claim the whole amount from the other. The ability of the depositor to raise a claim against the second heir in this case is more akin to simply solidarity, where only full satisfaction released the debtors, than to correality where litis contestatio with one debtor released the others. One might argue that if the depositor was able to raise a second claim where the heirs were liable only in partes this would most likely also be possible where the heirs were liable in solidum. If that were so the heirs in the latter instance must have been subjected to a regime of simple solidarity under which further claims against the other debtors was permissible even after litis contestatio with one of them. In turn this would mean that Marcellus must have been discussing the actio depositi in ius in D.16.3.22 because, as we argued in an earlier chapter, it was only in this remedy, and even then not until late classical law, that simple solidarity was applied in claims for a deposit.<sup>37</sup> However, we should note that the ability

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37. Of course, if it were true that Marcellus was discussing the action in ius in which simply solidarity was applied we would have to amend our dating of the introduction of this feature into the civil law action.

of the depositor to raise a second claim where the heirs were liable in partes is not itself simply solidarity. In simple solidarity the depositor had a claim in solidum against each debtor and would only proceed against the others where he did not receive full satisfaction from the first defender. In the case discussed at the beginning of D.16.3.22 the depositor could only raise a claim for 5,000 (in partem) against the first heir whom he sued, although he still had the option of a claim for 10,000 against the second heir if the first is proved to be insolvent. But a second claim was not available in the second case discussed in D.16.3.22 if we assume that the heirs were correally liable, because in that instance the full claim against one heir released the other. Arguably, therefore, the depositor might be in a more advantageous position where he could proceed against the debtors in partes. However, this particular inconsistency between the two cases is not in and of itself a fundamental argument against the idea that the solidary liability of the heirs was correal. Possibly the inconsistency simply did exist. Hence, while the latter part of D.16.3.22 tells us that the heirs might be liable in solidum 'as if they themselves had originally taken on the deposit [jointly]', it is best to conclude that the text tells us nothing about the particular nature of that solidarity.

CHAPTER XII

THE MEASURE OF DAMAGES IN THE ACTIO DEPOSITI IN FACTUM

## THE MEASURE OF DAMAGES IN THE ACTIO DEPOSITI IN FACTUM

There are two main questions which we will consider in this chapter: (1) what was the measure of damages in the actio depositi in factum and (2) what does the measure of damages tell us about the alleged penal nature of this action.

The formula of the actio depositi in factum is preserved by Gaius.

Gaius, 4.47 ... Iudex esto. Si paret Aulum Agerium apud Numerium Negidium mensam argenteam deposuisse eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse, quanti ea res erit, tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnato. Si non paret absolutio.

From the formula we can determine that condemnation in the action in factum followed upon satisfaction of two basic conditions<sup>1</sup>: (a) the fact that a deposit had been made (si paret ... mensam argenteam deposuisse) and (b) the failure to return dolo malo the same deposit (eamque dolo malo ... redditam non esse). The intentio makes a direct reference to the property deposited (mensam argenteam) and the judge is directed in the condemnatio, of the type quanti ea res est, to assess the value of the res at the moment of pronouncing sentence (erit)<sup>2</sup>. This means a valuation, not

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1. See Gandolfi, Il Deposito (Milan, 1976) p.74.

2. Gandolfi, op.cit., p.75. See also Jolowicz and Nicholas, Historical Introduction to the Study of Roman Law (Cambridge, 1972) p.204 n.7.

just of the nuda res, but also its fruits, accessories, and, in the case of deposits of slaves, their offspring<sup>3</sup>.

The structure of the formula, taken in conjunction with the fact that when first introduced the action in factum sanctioned only a failure to return the deposit (eamque dolo malo ... redditam non esse) - that is, the claim is that an object has not been returned, therefore the piece of property in question is the immediately identifiable loss to the pursuer - strongly supports the idea that in origin damages in the action in factum comprised only the objective value of the property (vera aestimatio rei).

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3. D.22.1.38.10 (Paul 6 ad Plaut.) Si possessionem naturalem revocem, proprietates mea manet, videamus de fructibus. et quidem in deposito et commodato fructus quoque praestandi sunt, sicut diximus.

Also, D.16.3.1.24 (Ulp. 30 ed.) Et ideo et fructus in hanc actionem venire et omnem causam et partum, dicendum est, ne nuda res veniat. As suggested by Rotondi, Scritti 2, p.73, the general, omnem causam may be a Justinianic intrusion, coming as it does somewhat oddly between the specific fructus and partus.

According to the normal rules of accessio those things which accede to the principal will necessarily be evaluated in the actio depositi. These, however, must be distinguished from things 'accessory' to the deposit, such as the shirt of a deposited slave; cf. D.16.3.1.5 (Ulp. 30 ed.) Quae depositis rebus accedunt non sunt deposita, ut puta si homo vestitus deponatur, vestis enim non est deposita: nec si equus cum capistro, nam solus equus depositus est. The statement, quae depositis rebus accedunt non sunt deposita, is taken by Gandolfi, op.cit. p.75 n.16, who follows Rotondi, op.cit. p.72 n.4, as meaning that an independent action (unspecified but presumably actio depositi) for the accessory objects would be denied to the pursuer. On the question of fruits see, Kaser, R.P.R. 1 (Munich, 1971) p.493 n.45.

Such an hypothesis conforms with the views of most scholars; indeed, the communis opinio goes one step further and argues that the mere value of the property constituted damages in the action in factum throughout classical law<sup>4</sup>.

However, the matter may not be quite so straightforward. There is some evidence to suggest that interesse came to be included in the action in factum in classical law. Whether damages comprised the objective value of the property (vera aestimatio rei) or whether, alternatively, the pursuer could recover his full interesse (id quod eius interest) is a problem which arises, not just in the context of depositum, but generally in relation to condemnationes of the type q.e.r.e. There is an extensive literature on the subject which traces the basis on which damages were assessed in these actions for the most part to the formal structure of the action itself. Levy<sup>5</sup> believes that a condemnatio q.e.r.e. always gave the pursuer his interesse, Siber<sup>6</sup> that it always gave him only

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4. See in particular, Kaser, Quanti Ea Res Est (Munich, 1935) p.69ff; Gandolfi, op.cit., p.75 and Maschi, La Categoria dei Contratti Reali (Milan, 1973) p.163f. Rotondi, Scritti 2, p.26 suggests that damages in the action in factum comprised id quod interest.

5. Privatstrafe und Schadensersatz (Berlin, 1915).

6. Römisches Recht 2 (Berlin, 1928), p.241ff.



the vera aestimatio rei; Kaser<sup>7</sup> and Voci<sup>8</sup> that it might give him 'value' or interesse depending upon the action. Thus Kaser argues that penal actions, which includes all actions in factum, gave the pursuer 'value' but that in some cases, where the penal action later came to fulfil a compensatory 'function' interesse was then also included<sup>9</sup>. However, id quod interest could always be recovered in the actiones arbitrariae formulated q.e.r.e. The reason was that these actions contained an authorisation to the iudex to order the pursuer to make restitutio (neque ea res ... restituetur) and to condemn only if this order was ignored. An evaluation of what restitutio would have entailed was not possible by aestimatio rei, hence the pursuer's interesse formed the basis for the assessment of damages in these actions.<sup>10</sup>

Voci<sup>11</sup> attacks Kaser's argument that it was the factor of restitutio which determined whether id quod interest was recovered in q.e.r.e. actions. He observes that a feature of formulae with q.e.r.e. is an intentio certa which mentions the primary right of the pursuer<sup>12</sup>. If the

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7. Q.E.R.E.

8. Risarcimento del Danno e Processo Formulare nel Diritto Romano (Milan, 1938) p.16ff.

9. Q.E.R.E., p.130ff.

10. Q.E.R.E., p.9ff.

11. Op.cit., p.16ff.

12. But see Voci, op.cit., p.4 n.9.

intentio contains a reference to property and the condemnatio directs the judge to evaluate the same property in money terms, then he (the judge) can only make an aestimatio rei<sup>13</sup>. On the other hand in iudicia where the formula runs: quidquid N<sup>n</sup>N<sup>n</sup> dare facere oportet, eius ... iudex condemnato, the judge has greater freedom precisely because of the indeterminate nature of the intentio and as a result he can condemn for id quod interest<sup>14</sup>.

As regards the problem that q.e.r.e. did not entail an aestimatio rei in all cases, Voci argues that there were certain instances where the form of the action was held to be secondary to the substance of the pursuer's claim. For example, in the actio ad exhibendum the pursuer did not want the value of the property as such but its production. The consequences of non-production might vary according to the circumstances; hence there could be no single objectively identifiable content to the condemnatio such as that achieved by aestimatio rei. It follows, therefore, that even although the formula was q.e.r.e., condemnation here was for id quod interest<sup>15</sup>.

Irrespective of the individual merits of the theories of these scholars, a common feature of their arguments is the

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13. This is the position in the actio depositi in factum.

14. Voci, op.cit., p.4f.

15. Voci, op.cit., p.6f.

belief that the formal structure of an action determines the basis for assessing damages, not only when the action was first introduced but throughout its classical law history. Thus, in the case of the actio depositi in factum, with the exception of Levy<sup>16</sup>, they all believe that only vera aestimatio rei could be recovered up until the time of Justinian. They do not admit that before Justinian there may have been development in the way in which damages were assessed, and hence they regard as interpolated statements of classical jurists which base the damages in this action on the pursuer's interesse.

Two preliminary objections to the rigidity of this formal approach can be made: (1) the failure to return a deposit might very well have involved the pursuer in loss beyond the simple value of the object in question. As jurisprudence developed it seems quite possible that some jurists were prepared to allow the pursuer a claim for such loss<sup>17</sup>. (2) The scope of the action in factum itself changed. D.16.3.1.16 shows that it came to lie in

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16. Levy, of course, is equally formal in so far as he believes that q.e.r.e. always gave interesse. We are guilty of an over-simplification in respect of Kaser; he argues that many actions in factum which were penal in origin came to fulfil a compensatory function in classical law and in place of aestimatio rei gave interesse; see post.

17. See the discussion of D.12.3.3 (Ulp. 30 ed.) post.

circumstances where property was returned in a damaged state<sup>18</sup>. Here, as distinct from the position where a deposit simply was not returned, there would be no logic in treating the pursuer's loss as the full value of the property originally entrusted.<sup>19</sup>

In this chapter we shall argue that there is evidence to suggest that in the course of classical law condemnation in the action in factum came to be for interesse in place of the simple value of the property.<sup>20</sup> That is to say,

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18. D.16.3.1.16 (Ulp. 30 ed.) Si res deterior reddatur, quasi non reddita agi depositi potest: cum enim deterior redditur, potest dici dolo malo redditam non esse. This is clearly a judicial extension of the action in factum. A full discussion of the text follows.

19. Daube, On the Third Chapter of the Lex Aquilia, L.Q.R. 52 (1936) p.253ff at p.259 makes an observation on what is an interesting analogy with the failure to return/the return in a deteriorated state cases of deposit. Comparing the first and third chapters of the Lex Aquilia he says, 'in all systems the interesse principle is earlier developed in the case of wounding than in that of complete destruction or withdrawal ... in the case of complete destruction ... there is a definite visible loss, i.e. the loss of the destroyed thing. At the time of the Aquilian there is no need to introduce here an abstract conception like damnum. It is different, however, if a slave is only wounded. No concrete thing is lost here. What is lost is the damnum, the difference between the former and the present value of the slave ...'

20. One can in fact detect a development in the views of Kaser on this point. In Q.E.R.E. and R.P.R. 1 (Munich, 1955), p.418 he says that only the 'objektive Wert' of the property could be claimed. Cf. R.P.R. 1 (Munich, 1971) where Kaser suggests that in classical law there was a tendency towards including interesse in the so-called reddere actions (... 'ist die Schätzung zwar vom objektiven Wert der zu leistenden Gegenstände ausgegangen, doch schreitet die klassische Entwicklung zu einer Berechnung des individuellen Schadens fort'.)

the depositor could claim for consequential loss where this was incurred but, by the same token, where property was returned in a damaged state he claimed only his loss and not the full value of the deposit. The development towards interesse in this latter case was probably accomplished first. Whereas 'ea res' in the clause q.e.r.e. in origin was a reference to 'the piece of property deposited', certainly by the time of Ulpian the condemnatio of the action in factum was a direction to the iudex to put a valuation on 'this matter'.

If damages in the actio depositi in factum comprised aestimatio rei and later the interesse of the pursuer the second main point to consider in this chapter is what these factors tell us about the alleged penal nature of the action.

Whether an action was penal can, in certain circumstances, be determined from the measure of damages which that action gave. This is most clearly the case where damages comprised a multiple, as in the actio furti nec manifesti where the pursuer recovered twice the value of the object stolen<sup>21</sup>. That multiple damages was definitely not a feature of the actio depositi in factum is shown by D.16.3.1.1 where we are told that in cases of ordinary deposit the praetor allowed the pursuer to recover only single damages.

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21. Kaser, Q.E.R.E., p.130ff.

D.16.3.1.1 (Ulp. 30 ed.) Praetor ait: quod neque tumultus neque incendii neque ruinae neque naufragii causa depositum sit, in simplum ..... iudicium dabo.

However, even in actions in which only single damages were recoverable the way in which those damages were assessed might indicate whether the action was penal or not. For example, Kaser, in his study of those actions with condemnationes of the type q.e.r.e.<sup>22</sup>, accepts the broad proposition that in a penal action the pursuer recovered the vera aestimatio rei or its multiple but in compensatory remedies he recovered his interesse (id quod eius interest)<sup>23</sup>.

With respect to actions in factum the argument is further developed. Kaser,<sup>24</sup> following Levy<sup>25</sup>, believes that in origin they were all penal. In principle, therefore, damages were vera aestimatio rei. However, in the course of their development some penal actions came to fulfil a compensatory 'function'. One sign that they now fulfilled

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22. Q.E.R.E., p.130ff, with some qualifications. See also, Levy, Privatstrafe und Schadensersatz, p.4f and p.24f.

23. In most cases they would be formulated quite differently; see R.P.R. 1 (Munich, 1971) p.499f.

24. Q.E.R.E., p.130ff.

25. Privatstrafe und Schadensersatz. At p.4f. Levy argues that q.e.r.e. always gave the pursuer interesse. However, in the context of the actions in factum interesse fulfilled a function no different from that of aestimatio rei; that is, in these actions the interesse was a penalty. The action could be seen to have taken over a compensatory 'function' when of it it is said: continet rei persecutionem.

such a 'function' is that damages comprised interesse instead of aestimatio rei<sup>26</sup>. This is precisely the development which Kaser would expect the actio depositi in factum to conform to<sup>27</sup>. The fact that it does not he ascribes to a special reason. In common with the other reddere actions damages comprised only aestimatio rei throughout classical law but only because of the so-called 'kondiktionenartig' nature of this group of actions<sup>28</sup>.

We should note that the measure of damages in the actions in factum is not presented by Levy or Kaser as proof of their penal origins. All actiones in factum are simply assumed to have been penal in origin and the fact that in some of them damages came to comprise interesse is proof that these particular actions had assumed a compensatory 'function' in developed law.

The argument that all actions in factum in origin were penal has been shown to be wrong<sup>29</sup>. Also, it is submitted, there is no reason to associate the development of damages from aestimatio rei to interesse in the actio depositi in factum with the progression of a penal action towards fulfilling a compensatory 'function'. Certainly when

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26. Q.E.R.E., p.130ff and p.165ff.

27. See, Q.E.R.E., p.69 n.4 and R.P.R. 1 (Munich, 1971) p.500 and p.535.

28. Q.E.R.E., p.82. But cf, note 20 above.

29. Mitteis, ZSS (37) 1916 p.328ff.



damages were interesse we would expect to classify the action as compensatory, damages being the pursuer's loss. The fact that in origin only aestimatio rei could be claimed in this particular action in factum does not mean that at that time it was penal, because, where a claim arose out of a failure to return a deposit, it is understandable that in the first instance its value will have been identified as the pursuer's loss. Against this background the consideration of interesse should be viewed merely as a more refined means of assessing the loss to be compensated.

We now turn to consider the measure of damages in the actio depositi in factum. Before answering this question, there is, however, one further complication with which we must first deal. Whether damages comprised interesse or aestimatio rei, we need to determine how this sum was arrived at; by means of the pursuer's iusiurandum in litem or by the litis aestimatio of the judge.

There are a number of texts possibly associated with the action in factum<sup>30</sup> which tell us that the pursuer in the actio depositi could make a iusiurandum in litem. The clearest statement to this effect is found in D.16.3.1.26

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30. C.4.1.10. In actione etiam depositi, quae super rebus quasi sine scriptis datis movetur, iusiurandum ad exemplum ceterorum bonae fidei iudicorum deferri potest. This does not refer to the action in factum.

Cf. D.16.3.5pr. Ei, apud quem depositum esse dicetur, contrarium iudicium depositi datur, in quo iudicio merito in litem non iuratur: non enim de fide rupta agitur, sed de indemnitate eius qui depositum suscepit. (A possible indirect reference to the a. in factum.)

(Ulp. 30 ed.) where the evidence for classical law is unequivocal because the authenticity of the text is beyond question<sup>31</sup>.

D.16.3.1.26 (Ulp. 30 ed.) In depositi quoque actione in litem iuratur.

More indirect, but still clear evidence that iusiurandum in litem was permissible in the actio depositi is provided by D.12.3.3 (Ulp. 30 ed.).

D.12.3.3 (Ulp. 30 ed.) Nummis depositis iudicem non oportet in litem iusiurandum deferre, ut iuret quisque quod sua interfuit, cum certa sit nummorum aestimatio. Nisi forte de eo quis iuret, quod sua interfuit nummos sibi sua die redditos esse: quid enim, si sub poena pecuniam debuit? aut sub pignore, quod, quia deposita ei pecunia adnegata<sup>32</sup> est, distractum est?

Although much of this text is thought to be corrupt, the statement that the judge should not allow iusiurandum in litem in the case of a deposit of money is above suspicion.<sup>33</sup>

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31. Index Intp. See also Burillo, Las Formulas de la actio depositi, SDHI 28 (1962) p.276f. He suggests that the word quoque in D.16.3.1.26 is to be explained by the fact that iusiurandum in litem was applied to the actio depositi by analogy from other actions of which Ulpian was thinking at the time of writing.

32. Abnegata.

33. A full discussion of the text follows. Chiazzese, Iusiurandum In Litem, (Milan, 1958) believes that the text does not refer to the actio depositi. Cf, Lenel, Pal. 2, p.614f. As to the authenticity of the statement that there was to be no iusiurandum in the case of a deposit of money, see Medicus, Id Quod Interest (Köln Graz, 1962) p.20ff and the scholars to whom he refers at p.22 n.18.

So, clearly if Ulpian felt it incumbent upon himself to exclude iusiurandum in such a case, cum certa sit nummorum aestimatio, the inference is that normally iusiurandum in litem must have been permitted in the action on deposit where the value of the property was not generally fixed.

Our third text is:

D.5.1.64pr. (Ulp. 1 disput.) Non ab iudice doli aestimatio ex eo quod interest fit, sed ex eo quod in litem iuratur: denique et praedoni depositi et commodati ob eam causam competere actionem non dubitatur.

This text is one of a number<sup>34</sup> where a distinction is drawn between quanti ea res erit (id quod interest) and quanti in litem actor iuraverit, the latter being treated as the greater amount. It is argued by Chiazzese<sup>35</sup> and Provera<sup>36</sup> that in classical law the jurists adhered strictly to the wording of the formula and hence that the condemnation quanti ea res est would have been the same as the iusiurandum in litem of the pursuer. Thus, where a distinction is drawn between these two concepts, as in the above text, this is thought to be Justinianic. Watson<sup>37</sup>, however, argues that while logically this distinction ought

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34. Also, D.6.1.68; 12.3.2; 12.3.8.

35. Op.cit., p.193ff.

36. Contributi allo Studio del Iusiurandum in Litem (Turin) p.14ff.

37. Iusiurandum In Litem in the Bonae Fidei Iudicia, TVR 34 (1966) p.175ff at p.176 n.21.

not to have been made, in practice the pursuer would always have claimed more than his interesse where he made a iusiurandum in litem. This, he suggests, would explain why the classical jurists on occasion spoke in the terms which the Italian scholars view as corrupt.

Watson's argument for the authenticity of this series of texts is attractive but unsound - at least in so far as it relates to D.5.1.64<sup>pr.</sup> His argument is based on the assumption that the only difference presented here by Ulpian between id quod interest and iusiurandum in litem is the amount of the condemnation. Yet, where the defender is guilty of dolus Ulpian says that it is precisely because resort is to iusiurandum in litem rather than to an evaluation of interesse by the judge that even a thief could bring an actio depositi or actio commodati in respect of the stolen property which he has deposited or given out on loan; (denique et praedoni depositi et commodati ob eam causam competere actionem non dubitatur.) That the pursuer makes a iusiurandum in litem in this case is therefore presented as the reason (denique ... ob eam causam) why the thief could bring an action on deposit where he might not have been able to had the judge fixed the damages by referring to interesse. This means that there must have been some other difference between the two ways of assessing the loss of the pursuer beyond that of the simple amount of the condemnation in each case.

But the rejection of Watson's argument does not mean to say that the text is interpolated<sup>38</sup>. This can be substantiated by reference to the other two tests which state that the thief could bring an actio depositi.

D.16.3.1.39 (Ulp. 30 ed.) Si praedo vel fur deposuerint, et hos Marcellus libro sexto digestorum putat recte depositi acturos: nam interest eorum eo, quod teneantur.

D.16.3.31 (Tryph. 9. disput.) .... quod si ego ad petenda ea non veniam, nihilo minus ei restituenda sunt qui deposuit, quamvis male quaesita deposuit. Quod et Marcellus in praedone et fure scribit.

It is highly probable on an examination of these two texts that there had been some debate on the point under consideration; viz. - could a thief competently raise an action on deposit? Interestingly both Tryphoninus and Ulpian refer for authority to Marcellus, which De Ruggiero<sup>39</sup> plausibly argues might suggest that Marcellus was the originator of the rule which said that he could. Alternatively, the writings of Marcellus may simply have marked the point in time when such a rule became generally acceptable. Whichever of these views is correct, both suggest a background of discussion of the merits of the rule. Further evidence to this effect may also be furnished by the fact that both the fragment from

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38. Cf. Provera, op.cit., p.14ff.

39. Depositum vel Commodatum, BIDR 19 (1907) p.5ff at p.21 n.1.

Tryphoninius and D.5.1.64 from Ulpian are taken from collections of disputationes.

However, a problem is presented when we compare D.16.3.1.39 and D.5.1.64pr. The former text states that the thief, being liable to the owner,<sup>40</sup> thereby had an interest [in the property] and so could competently raise an actio depositi. On the other hand D.5.1.64pr, states that it is precisely because, when assessing the damages in the actio depositi, reference is to the pursuer's iusiurandum in litem rather than to his interesse that the thief could bring the action at all. There is, therefore, arguable a contradiction between these two texts which is especially noteworthy because they are both written by Ulpian. The resolution of this problem lies, however, in identifying the real nature of the discussion in D.5.1.64pr.

The inference to be drawn from D.5.1.64pr. is that the thief would have been unsuccessful in his claim had damages in the actio depositi been fixed by the judge with reference to the interesse of the pursuer<sup>41</sup>. Was this because (a) the thief was conceived as having no interest in the stolen deposited property, or (b) was it thought that because the thief's interest in the property was

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40. The liability referred to would be to the condictio furtiva or vindicatio rather than to the actio furti.

41. This is an over-simplification; see the discussion which follows.

dishonest he should not receive damages in respect of it? D.16.3.1.39 gives as the reason why the thief could bring an actio depositi the fact that he did have an interest in the property. The clause nam interest eorum eo quod teneantur is likely to be the presentation by Ulpian of the main point in Marcellus's argument on this question. So, in view of the acceptance here by Ulpian of the opinion of Marcellus, it seems improbable that the thief's having no interest in the property was Ulpian's reason in D.5.1.64<sup>pr.</sup> for holding that the thief would fail in an actio depositi had damages been assessed with reference to interesse. Indeed, we can go further. Even to make a iusiurandum in litem one necessarily had to have an interest of some form in the property; iusiurandum was simply a means of assessing that interest. This is illustrated by the opening sentence of D.12.3.3 where Ulpian says that in the case of a deposit of money the judge should not refer to the pursuer's iusiurandum in litem, ut iuret quisque quod sua interfuit<sup>42</sup>. Hence we can be certain that had it not been decided that the thief did have an interest in the property he would have been barred absolutely from raising an actio depositi even where damages were assessed with reference to his oath.

The alternative explanation why, were reference to interesse, the thief would not have an action on deposit

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42. This part of the text is thought by some scholars to be interpolated; see post.



relates to the nature of his interest in the stolen property. The problem is that the thief has acquired the deposited property unlawfully. As we have seen there were probably some jurists who thought that this fact excluded the thief completely from raising an actio depositi on the grounds that he should not be viewed as having any interest at all in the property. Marcellus, however, seems to have settled the matter to the contrary. This having been said, we should nevertheless continue to view D.5.1.64pr. against the background of debate and against the background of Ulpian's acceptance of the opinion of Marcellus.

Where the judge assesses the damages in an action with reference to the pursuer's interesse he himself has to make an evaluation of that interest. However, where the pursuer makes a iusiurandum in litem it is he who makes the evaluation of his interest, not the judge. It is this factor which explains D.5.1.64pr. In the actio depositi the judge does not have to make an evaluation of the thief's dishonest interest. A small point perhaps, but simply a further argument used by Ulpian to support the view that the thief could competently raise an action on deposit. Note the way in which the text is concluded by non dubitatur. Recognising the existence of the debate in this context concerning the position of the thief, Ulpian sees the matter as put beyond doubt that the thief could raise the action when one takes account of the additional

fact that damages in the actio depositi were assessed with reference to the pursuer's iusiurandum. We conclude, therefore, that the distinction which is drawn in this text between q.e.r.e. and quanti in litem actor iuraverit is genuine. This is a point to which we will return in due course.

Firstly we must determine whether any of the texts which mention iusiurandum in litem in the context of the actio depositi concern the action in factum. It is widely thought that D.16.3.1.26 and D.12.3.3 refer to this action.<sup>43</sup> One important factor used to substantiate this opinion is that iusiurandum in litem was inappropriate in the bona fide iudicia; the reason being that it was incompatible with good faith that one of the parties to the dispute could himself fix the level of damages.<sup>44</sup> Were this correct D.5.1.64pr. would also necessarily concern the action in factum. However it may in fact have been possible for iusiurandum to be used in the bona fide action in classical law<sup>45</sup>.

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43. Levy, Zur Lehre von den sog. Actiones Arbitrariae, ZSS 36 (1915) p.1ff at p.75; Voci, op.cit., p.80; Kaser, Q.E.R.E. p.71; Burillo, op.cit., p.277f; Medicus, op.cit., p.260.

44. Burillo, op.cit., p.278 who follows Betti, Studi sulla Litis Aestimatio nel Processo Civile Romano 1, (1915), p.57.

45. Watson, op.cit., p.175ff; cf, Broggini, Sulle Origini del Iusiurandum In Litem, Studi Betti 2, p.119ff.

Further evidence that D.16.3.1.26 and D.12.3.3 referred to the praetorian actio depositi is thought by some to be furnished by the position of the texts in Ulpian's edictal commentary. The discussion centres on D.16.3.1.26 to which D.12.3.3 is linked by Lenel<sup>46</sup>. But the views of Lenel on this question have been subject to change: to begin with he suggested that the text was part of a section (D.16.3.1.20-26) which concerned the action in factum<sup>47</sup>, then that it concerned the formula in ius concepta<sup>48</sup>, and finally he came to the conclusion that the section discussed the officium iudicis with no indication which of the two formulae for deposit was under discussion<sup>49</sup>. Taubenschlag<sup>50</sup>, however, believes that the section dealt with the officium iudicis in relation to the action in factum. Watson<sup>51</sup>, following Lenel, argues that if one cannot detect to which of the two formulae the section applied, the texts must be of a general nature from which the deduction could be made that iusiurandum would be permitted in both the action in ius and the action in factum.

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46. Edictum Perpetuum (3rd ed.) p.289.

47. In the first edition of Edictum Perpetuum which was unavailable to me. A brief history of the development of Lenel's views is, however, given by Taubenschlag, Zur Geschichte des Hinterlegungsvertrages im römischen Recht, Grünhuts Zeitschrift 35 (1908) p.129ff at p.136ff.

48. Palingenesia Iuris Civilis 2, p.614, though clearly with reservations.

49. Edictum Perpetuum (3rd ed.) p.289.

50. Op.cit., p.137.

51. Op.cit., p.185.

But, he concludes, 'the proper verdict from the internal evidence of the texts and their content must be non liquet'.<sup>52</sup>

In fact there can be no doubt that iusiurandum in litem was permissible in the actio depositi in factum. For the actio commodati this is shown by D.13.6.3.2.

D.13.6.3.2 (Ulp. 28 ed.) In hac actione sicut in ceteris bonae fidei iudiciis similiter in litem iurabitur: et rei iudicandae tempus, quanti res sit, observatur, quamvis in stricti litis contestatae tempus spectetur.

Quanti res sit indicates that the text concerned the action in factum, and therefore, as is generally agreed, sicut ... iudiciis is interpolated<sup>53</sup>. If the pursuer in the praetorian actio commodati was able to make a iusiurandum in litem this is strong evidence that he was also able to in the actio depositi. However, on the basis of the arguments which have been put forward, there is room for doubt whether D.16.3.1.26. and D.12.3.3 in fact concern the actio depositi in factum. But, as regards D.12.3.3. two further observations can be made: (1) the text deals with a straightforward claim for the return of deposited money for which the action in factum is appropriate, (2) the statement, quod sua interfuit nummos

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52. See also, Klami, Mutua Magis Videtur Quam Deposita (Helsinki, 1969) p.78 n.33.

53. See Watson, op.cit., p.185f.

sibi sua die redditos esse appears to be a reference to the action in factum (eamque .... redditam non esse). Normally this part of the text is held to be interpolated but this view is incorrect<sup>54</sup>. Therefore on balance it is likely that D.12.3.3 did refer to the action in factum. Equally this is the likely conclusion with respect to D.16.3.1.26 if Lenel is right in linking the two texts together.

We have established that in normal circumstances damages were assessed in the praetorian actio depositi by reference to the iusiurandum in litem of the pursuer. We can therefore return to our main theme which concerns the content of those damages. The question is whether in classical law the pursuer was limited to swearing the oath of the value of the deposited property or whether he could take account of his full interesse.

With regard to the texts on deposit where we find references to interesse it is helpful to distinguish two points: (1) whether the term interesse which appears in the texts is genuine. If it is, this suggests that it was possible to conceive the damages in the actio depositi in factum as the interest of the pursuer. But this by itself does not prove that damages might comprise more than the

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54. See the discussion of the text which follows.

value of the property in so far as the practice may have been to refer to the value of the property as the interest of the pursuer. Therefore, we must determine (2) whether the texts tell us anything about the actual content of the damages in this action.

In D.16.3.1.44<sup>55</sup> (Ulp. 30 ed.) and D.16.3.22<sup>56</sup> (Marcellus 5 digest.) interesse is used in the context of deposits made or held by more than one party. In the former text the term is used when referring to the half share of one of the depositors in the property; while in the latter text it is employed where property deposited with a deceased is divided between his two heirs. In a claim against one of the heirs the pursuer can only claim one half of the original deposit, this being his interest with respect to the property held by that heir. Interesse in both these cases signifies the extent of the pursuer's claim in circumstances where he cannot reclaim the whole amount deposited. It therefore signifies the content of the damages but only in the sense that they are half what

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55. D.16.3.1.44 (Ulp. 30 ed.) Sed si duo deposuerint et ambo agant, si quidem sic deposuerunt, ut vel unus tollat totum, poterit in solidum agere: sin vero pro parte, pro qua eorum interest, tunc dicendum est in partem condemnationem faciendam.

56. D.16.3.22 (Marcellus 5 digest.) Si duo heredes rem apud defunctum depositam dolo interverterint, quodam utique casu in partes tenebuntur: nam si diviserint decem milia, quae apud defunctum deposita fuerant, et quina milia abstulerint et uterque solvendo est, in partes obstricti erunt: nec enim amplius actoris interest ...

they might have been. We are not told whether the damages are half the value of the property or whether the pursuer could claim for losses over and above the value.

D.16.3.1.43<sup>57</sup> (Ulp. 30 ed.) discusses a case where property is deposited with two persons. We are told that if one of the depositors quod interest praestiterit, this has the effect of releasing the other depositors from liability. Interesse in this case means the damages due to the pursuer. However it must be said that the term appears in a part of the text which is generally thought to be interpolated.<sup>58</sup> Also, even if the term interesse is genuine in this context, its use again tells us nothing about the actual content of the damages.

With regard to D.5.1.64pr. we saw earlier that there was no reason to suspect the term interesse (ex eo quod interest) and the comparison between it and ex eo quod in litem iuratur. But in fact, prima facie, we are told in this case that the actio depositi could competently be raised by

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57. D.16.3.1.43 (Ulp. 30 ed.) Si apud duos sit deposita res, adversus unumquemque eorum agi poterit nec liberabitur alter, si cum altero agatur: non enim electione, sed solutione liberantur. Proinde si ambo dolo fecerunt et alter quod interest praestiterit, alter non convenietur exemplo duorum tutorum: ...

58. Index Intp.; cf Litewski, Studien zur Verwahrung im römischen Recht (Warsaw, 1978), p.6.



a thief precisely because damages were referred to iusiurandum and not to the pursuer's interesse! However, it is important to place the emphasis of this comparison correctly. Ulpian says that the judge does not refer damages to interesse (which he himself would evaluate) but to iusiurandum in litem (where the evaluation is made by the pursuer). The real nature of the comparison is not in the content of the damages but in how they are arrived at. Only on this understanding is denique ... ob eam causam explicable. So, if we lay the stress on the fact that it is the judge who does not refer to interesse in this action, clearly this gives to interesse a positive connotation in Ulpian's discussion. Ex eo quod interest fit represents the damages in the actio depositi<sup>59</sup>. The only point of distinction with ex quod in litem iuratur is that here the pursuer himself puts the value on his interest. This correspondence between interesse and iusiurandum in litem is further supported by Ulpian's statement in D.12.3.3. He effectively says that by iusiurandum in litem we swear what is our interest<sup>60</sup>.

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59. We should note the way in which the text is framed: non ab iudice ... in litem iuratur is a general statement referring to aestimatio doli. Only on the basis of denique ... non dubitatur can we refer the facts of the first half of the text to the actiones depositi and commodati.

60. D.12.3.3. Nummis depositis iudicem non oportet in litem iusiurandum deferre, ut iuret quisque quod sua interfuit.

We conclude therefore that certainly by the time of Ulpian interesse as a term was used to refer to the damages in the actio depositi. However, yet again, there is no way of telling from D.5.1.64pr. what the precise content of those damages might have been. In addition we cannot be absolutely sure that the action in factum was the object of the discussion in this text.

D.12.3.3 (Ulp. 30 ed.), which is the final and most interesting text for our purposes, has given rise to an extensive literature. The part which states that iusiurandum in litem was not admissible in the case of a deposit of money cum certa sit nummorum aestimatio is generally regarded as authentic<sup>61</sup>. The remainder of the text is almost universally thought to be interpolated<sup>62</sup>, though within this body of opinion there are two approaches, one more extreme than the other. Voci<sup>63</sup> believes to be corrupt, not only the end section nisi forte ... fin but also the earlier statement ut iuret quisque quod sua interfuit. The foundation for this view is the belief that the text refers to the formula in factum and that damages in that action took account of the value of the deposited property, not the pursuer's interesse<sup>64</sup>. Ut iuret quisque

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61. Voci, op.cit. p.79; Provera, op.cit. p.43ff; Pringsheim, Studi Riccobono 4, p.332; Kaser, Q.E.R.E. p.71; Medicus, op.cit. p.20ff; Klami, op.cit. p.78.

62. Index Intp., especially the scholars referred to in note 49 above.

63. Op.cit. p.79.

64. For example, Kaser, Q.E.R.E. p.69ff.

quod sua interfuit and nisi forte ... fin are therefore seen as complementary additions concerned with making interesse the basis for the assessment of damages in the actio depositi<sup>65</sup>. Pringsheim<sup>66</sup> on the other hand only treats the concluding section of the text, nisi forte ... fin as interpolated. This difference between Voci and Pringsheim does not, however, indicate a significant difference in their approach to the text. Pringsheim reads it as denying a iusiurandum in litem by the pursuer of quod sua interfuit in cases of deposits of money<sup>67</sup>. Nisi forte ... fin he nevertheless regards as a post-classical addition by jurists who were the first to believe that interesse should form the basis for the assessment of damages in the case of debts of money.

Besides the conviction that calculation of interesse in the actio depositi in factum was excluded in classical law, the other major argument used to support the above approach turns on the present reading of D.12.3.3. There are allegedly formal indications to suggest that the last half of the text is interpolated.

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65. By Justinian for whom the distinction between the action in factum and the action in ius was no longer important and who was concerned with presenting a single treatment of deposit on the basis of the latter action.

66. Op.cit. p.332.

67. He therefore seems to admit that were iusiurandum in litem allowed in this case the pursuer could claim his interesse.

Medicus<sup>68</sup> regards as particularly indicative of corruption (a) the use of the word forte<sup>69</sup> and (b) the present form of the text where, having said that iusiurandum in litem is not allowed, Ulpian is then seen to change his mind by the addition of nisi forte ... fin.

The nisi clause introducing a qualification of what goes before has long been regarded as a sign of interpolation<sup>70</sup>. Certainly it must be said that were Ulpian the author of the text in its entirety, its present form would be surprising. Therefore the communis opinio that nisi forte ... fin is an addition may be correct. However, before accepting that this is a post-classical or Justinianic addition, we must first explore the possibility that it is in fact Ulpian's own qualification of a rule found in an earlier or different work.

Medicus is of the opinion that in cases of debts of money, in classical law, where the defender failed to pay or was in mora, only usurae could be claimed, not the pursuer's full interesse. Proof of this, he believes, is furnished primarily by a group of texts, of which D.12.3.3 is one, in which those parts which allow to the pursuer

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68. Op.cit. p.22.

69. See also, Guarneri Citati, Indice delle Parole e Frasi Ritenuti Indizio di Interpolazione nei Testi Giuridici Romani (Milan, 1927) and the supplements in St. Riccobono 1, p.701ff and Eschr. Koschaker 1, p.117ff.

70. Eisele, ZSS 10 (1889) p.296ff.

compensation for his interesse are corrupt<sup>71</sup>. The other main texts in this group are D.13.4.2.8 (Ulp. 27 ed.) and D.13.4.4.pr. (Ulp. 27 ed.) both of which discuss the actio de eo quod certo loco. The precise nature of the formula of this action is unknown<sup>72</sup>. Certainly it was not a bona fide action<sup>73</sup>. In fact it may have contained a condemnatio which, like that in the praetorian actio depositi, was formulated q.e.r.e.<sup>74</sup> However, notwithstanding the doubt surrounding this formula, there is a common belief that, as in the actio depositi in factum, in classical law the pursuer could not claim his interesse in this remedy<sup>75</sup>. Kaser, referring to the actio de eo quod certo loco says, 'ist nur die objektive Wertdifferenz zu berechnen, nicht das individuelle Interesse'<sup>76</sup>.

We will now examine the texts - both from Ulpian - which discuss the actio de eo quod certo loco. This is a stricti iuris action which, as we have said, may have been formulated

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71. Op.cit. p.24. Medicus also uses D.18.6.20 to substantiate this argument, a text which we discuss below.

72. Kaser, Q.E.R.E. p.125f.

73. Medicus, op.cit. p.21.

74. For a brief survey of the problem, see Honsell, Quod Interest im Bonae-Fidei-Iudicium (Munich, 1979) p.170 n.20.

75. For the main literature, see Honsell, op.cit. p.170 n.17.

76. R.P.R. 1, (Munich, 1971) p.639 n.43.

q.e.r.e. If we find that Ulpian allowed the pursuer to claim his interesse in this action it would support the argument that he was prepared to allow the recovery of interesse in the stricti iuris actio depositi in factum, especially as we have supporting evidence to this effect in D.12.3.3 which is also from Ulpian.

Of the two texts on the actio de eo quod certo loco, D.13.4.2.8 (Ulp. 27 ed.) is the more important.

D.13.4.2.8 (Ulp. 27 ed.) Nunc de officio iudicis huius actionis loquendum est, utrum quantitati contractus debeat servire an vel excedere vel minuere quantitatem debeat, ut, si interfuisset rei Ephesi potius solvere quam eo loci quo conveniebatur, ratio eius haberetur. Iulianus Labeonis opinionem secutus etiam actoris habuit rationem, cuius interdum potuit interesse Ephesi recipere: itaque utilitas quoque actoris veniet. Quid enim si traiecticiam pecuniam dederit Ephesi recepturus, ubi sub poena debebat pecuniam vel sub pignoribus, et distracta pignora sunt vel poena commissa mora tua? Vel fisco aliquid debebatur et res stipulatoris vilissimo distracta est? In hanc arbitrariam quod interfuit veniet et quidem ultra legitimum modum usurarum. Quid si merces solebat comparare: an et lucri ratio habeatur, non solius damni? Puto et lucri habendam rationem.

The actio de eo quod certo loco which this text discusses gave the iudex discretion to determine what allowance was to be made where what was due in one place was sued for at another<sup>77</sup>. For example, the level of interest payable on a sum of money might be less at the place set aside for payment than at the place where the action is finally

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77. Buckland, Textbook of Roman Law, p.660.

brought<sup>78</sup>. In this case there is an advantage for the debtor in having the action brought at Rome rather than, say, at Ephesus<sup>79</sup>. Equally, however, the reverse might be the case; for example, what was worth 100 at Ephesus might be worth 150 at Rome. In its developed form the judge could take account of the interest of both parties in this action<sup>80</sup>. But when he first introduced the actio de eo quod certo loco the praetor had in mind only the protection of the interest of the defender. Only later - as the result of judicial extension of the action - was the interest of the pursuer taken into consideration<sup>81</sup>. It is precisely to this judicial extension that Ulpian refers in D.13.4.2.8 in the words: Iulianus Labeonis opinionem secutus etiam actoris habuit rationem, cuius

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78. Precisely the point made by Gaius in D.13.4.3 (Gaius 9 ed. prov.) For a useful discussion of the utilitas of the creditor or debtor in having an action brought at a particular place, see Dumas, L'Action de eo quod certo loco dari oportet en Droit Classique, NRH (1910) p.610ff especially at p.616ff.

79. So if the creditor sues at Ephesus for the amount owing at Rome he risks losing his claim on the grounds of plus petitio; see Dumas, op.cit. p.619ff.

80. D.13.4.2pr. (Ulp. 27 ed.)

81. Dumas, op.cit. p.624f; Lenel, Ed. Perpetuum p.241f; Kaser, Zum Ediktsstil, Festschrift Schulz 2, p.66f; R.P.R. 1, p.639.



interdum potuit interesse Ephesi recipere<sup>82</sup>. Thereafter, Ulpian proceeds to discuss the precise nature of the losses which he believes should be taken into account when determining the pursuer's interest for the purposes of the action.

The interpolationist approach to this concluding part of the text is taken by Beseler<sup>83</sup> who is followed by Kaser<sup>84</sup> and Medicus<sup>85</sup>. Their arguments consist of: (a) formal grammatical considerations<sup>86</sup>; (b) objections to the present structure of the text, especially (1) the introduction of the allegedly corrupt section by quid enim si which like the nisi clause is taken as a sure sign of the work of the compilers, and (2) the fact that, as in D.12.3.3, the

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82. See the arguments of the scholars referred to in n.70 above. This point is made here to emphasise the fact that the interest to which Julian and Labeo were referring was different from that which Ulpian proceeds to discuss. Following the categories established by Kaser, R.P.R. 1, p.639 n.43 - Julian and Labeo believed that the 'objektive Wertdifferenz' should be considered in this action also where this was in the interest of the pursuer; Ulpian on the other hand discusses the 'individuelle Interesse' of the pursuer.
83. Edictum de eo quod certo loco, TVR 8 (1928) p.326ff at p.331f; Beiträge 1, 65.
84. Q.E.R.E. p.128; Festschrift Schulz 2, p.66; R.P.R. 1, p.639 n.43.
85. Op.cit. p.20ff.
86. Kaser, Q.E.R.E. p.128 n.16 points in particular to the possible lack of a subject for the verb dederit and the definite lack of a subject for solebat. In fact a very large number of objections have been raised which relate to nearly every part of the text; see Index Intp.

section is formulated as a series of what remain unanswered questions; (c) that in content the opinion of Ulpian contradicts Hermogenianus in D.18.6.20.

D.18.6.20 (Hermog. 2 epit.) Venditori si emptor in pretio solvendo moram fecerit, usuras dumtaxat praestabit, non omne omnino, quod venditor mora non facta consequi potuit, veluti si negotiator fuit et pretio soluto ex mercibus plus quam ex usuris<sup>87</sup> quaerere potuit.

The text considers the case where the buyer is late in paying the price. Medicus<sup>88</sup> believes it shows that even in the time of Hermogenianus the pursuer could only claim interest (usurae) in such circumstances. He emphasises in support of this proposition the statement usuras dumtaxat praestabit and the emphatic nature of the denial of compensation for other losses (non omnino). The relation of the text with D.13.4.2.8 turns on what he thinks to be the correspondence in the nature of the loss which Ulpian allows the pursuer to reclaim and which Hermogenianus refuses him. The alleged contradiction in the views of the

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87. Haymann, Haftung für unmittelbaren und mittelbaren Schaden beim Kauf, Studi Bonfante 2, (Milan, 1930) p.443ff at p.462; Pringsheim, op.cit. p.334 n.104 and Medicus op.cit. p.18 n.4 believe that this is a scribal error and reconstruct the text as follows: [ex] usur[is] <as>. They suggest that logically we would find in the text a comparison between the interest per se (usuras) and the profit made from the sale of the property; not a comparison between the profit from the sale of the property and the profit from the interest (ex usuris). The emendation is regarded as unnecessary by Honsell, op.cit. p.168 n.6.

88. Op.cit. p.18f.

jurists is resolved by treating those of Ulpian as interpolated.<sup>89</sup>

The majority view that in classical law in cases of mora or non-payment of money only usurae could be claimed has recently been attacked by Honsell.<sup>90</sup> He regards the opinions of Ulpian given in D.12.3.3; D.13.4.2.8 and D.13.4.4 as substantially genuine.

With regard to D.18.6.20 he argues that there is no contradiction between the opinion of Hermogenianus and those of Ulpian found in the above-mentioned texts. He points out that the statement non omne omnino acts, not as a categorical denial, but rather as a limitation on the nature of the losses for which the pursuer could claim compensation. Hermogenianus, he suggests, is simply saying that the pursuer could not recover every single loss which he had suffered. Honsell then proceeds to argue that in fact there is no correspondence in the nature of the loss which Ulpian allows the pursuer to reclaim and which Hermogenianus refuses him. Ulpian says that account should be taken of the pursuer's positive loss

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89. Also, see especially Pringsheim, op.cit., p.332. Haymann, op.cit. p.460f, however, believes that the compilers overturned the opinion of Hermogenianus which originally read non usuras dumtaxat praestabit [non] <sed> omne omnino.

90. Op.cit., p.167ff. Honsell develops his argument in greater detail than is reproduced here.

- such as where, as a result of the non-payment of the money, a pledge could not be redeemed or a penalty was incurred. On the other hand Hermogenianus denies compensation, not for the pursuer's positive loss, but for the advantages which he had been prevented from acquiring as a result of the late payment of the price (quod venditor mora non facta consequi potuit). The latter opinion, Honsell adds, is quite understandable because to allow compensation for this lost profit would effectively mean that the rules limiting the amount of interest which could normally be claimed would be circumvented<sup>91</sup>. That is to say, on any debt of money a limitation was placed on the level of interest which could be claimed (legitima usura)<sup>92</sup>. If a claim was allowed for lost profit (as opposed to positive loss which was treated differently) the sum recovered might exceed the amount which could lawfully be claimed taking into account both principal sum and interest.

There is, however, a certain difficulty associated with Honsell's approach because Ulpian in the last part of D.13.4.2.8 allows the pursuer to recover compensation even for his lost profit. (In hanc arbitrariam quod interfuit veniet et quidem ultra legitimum modum usurarum, quid si merces solebat comparare: an et lucri ratio habeatur,

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91. Op.cit., p.169.

92. See Berger, Encyclopedic Dictionary of Roman Law, p.754.

non solius damni? Puto et lucri habendam rationem). How is this problem resolved by Honsell?

Firstly, he observes that Ulpian, to illustrate the sort of losses for which the pursuer could claim compensation, chooses the example of traiecticia pecunia<sup>93</sup>. As a result of the late payment of this money a pledge is sold or a penalty is incurred<sup>94</sup>. Ulpian then puts the case where money is owned to the fiscus and due to the defender's default property given by the creditor as security is sold for very much less than its true value. There then follows the part of the text in which Ulpian allows the pursuer to claim for lost profit. This part of the text, argues Honsell, refers back to the case of traiecticia pecunia. Confirmation of this, he believes, is furnished by the sentence, in hanc arbitrariam quod interfuit veniet et quidem ultra legitimum modum usurarum, because in such loans there was no limitation on the level of interest which

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93. See Berger, op.cit., p.469. 'A loan given in connection with the transportation of merchandise by vessel ... Because of the risk which the loan-giver assumed (shipwreck, piracy) the rate of interest was unlimited until Justinian fixed it at 12 per cent.'

94. Ulpian in discussing the case where payment was to be made at Ephesus but due to the defender's default (mora tua) the action is brought elsewhere. Not only would the 'objektive Wertdifferenz' of proceedings being brought elsewhere be taken account of in the action, but also, according to Ulpian, the consequences of the delay in payment. See Honsell, op.cit. p.170 who argues against the position taken on this point by Medicus.

could be claimed by the creditor<sup>95</sup>. Furthermore it is precisely this fact that unlimited interest could be claimed in cases of traiecticia pecunia which according to Honsell provides the key to the seeming contradiction between Hermogenianus and Ulpian. To refer back to the discussion of D18.6.20 - Honsell suggested that the underlying reason why Hermogenianus would not allow compensation for lost profit was that this would effectively result in circumvention of the rules on legitima usura. It follows, therefore, that in cases where there was no limitation on the levels of interest which could be claimed, this problem did not arise and the way was open to allow compensation for lost profit. So, as far as Honsell is concerned, the statement of Ulpian in D.13.4.2.8 allowing compensation for lost profit can be explained as an exceptional decision which was brought about by the fact that special rules on interest applied to traiecticia pecunia. Honsell also draws attention to the tentative nature of Ulpian's decision on this particular point (puto et lucri habendam rationem) and further suggests that there may have been some controversy on the matter in classical law which was expunged from the text by the compilers. Even if this is not so, he thinks that the text has certainly been abbreviated by the compilers, which explains its grammatical irregularities - as, for example, the absence of a subject for the verb solebat.

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95. Op.cit., p.170 n.16.

This is an attractive argument, but is it correct? As far as D.18.6.20 is concerned, we have to establish what effect is to be given to the statement non omne omnino, quod venditor mora non facta consequi potuit. In view of the quite categoric assertion that the seller could only claim interest where there was delay in payment, we might read non omne ... potuit as excluding all his other claims, whether these were for lost profit or for the positive loss which he had suffered. The verb consequor, to obtain<sup>96</sup>, suggests, however, that Hermogenianus was referring to lost profit. This is confirmed by the concluding example, veluti si negotiator fuit ... quaerere potuit which qualifies non omne ... consequi potuit. That is to say, Hermogenianus denies to the seller compensation for what he might have earned through trading - clearly lost profit!! What then about the categoric limitation of claims to interest (usuras dumtaxat praestabit)? This statement has to be read in the context of the discussion in which it is used. Hermogenianus considers and denies claims for lost profit and therefore in such cases the seller will only be able to claim interest! So we can see that Honsell is correct in his analysis of this text. Nothing is said here which contradicts the statement of Ulpian allowing the pursuer to claim for his positive loss.

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96. Lewis and Short, A Latin Dictionary, p.429; Oxford Latin Dictionary, p.413.



The remaining problem is Ulpian's ruling in D.13.4.2.8 that the pursuer could claim even for lost profit. As we have seen, there are two main elements to Honsell's argument: (1) that the concluding part of the text refers to traiecticia pecunia and (2) that lost profit could be claimed because of the special rules on levels of interest in such cases. If Honsell is correct, in hanc arbitrariam ... usurarum therefore acts as a form of introduction to the discussion of claims for lost profit, stating as it does the grounds (ultra legitimum modum usurarum) for the affirmative decision which follows. In view of the fact that the text has no doubt been abbreviated, it is difficult to say with certainty whether this analysis represents the position as Ulpian wrote it. Nevertheless it is certainly a possible interpretation.

However, in view of the present form of the text, there is arguably a preferable approach. In the examples given by Ulpian, the debt of money which is the object of the claim arises as the result of a loan (traiecticia pecunia), or on a stipulation (res stipulatoris vilissimo distracta est). But these examples are mentioned simply in the context of a general discussion of the actio de eo quod certo loco. So, given that the basis of the claim is not specified in the statement in hanc arbitrariam ..., this sentence must, on a normal reading, refer generally to the self-same action irrespective of whether the money is owed on a loan or on a stipulation. If the sentence in hanc arbitrariam ..

... usurarum were simply to run as follows: in hanc arbitrariam quod interfuit veniet it would occasion no surprise. The text is formulated as a series of questions and this is Ulpian's answer to those questions. He says that the pursuer's interesse will be taken into account in the action. What then about, et quidem ultra legitimum modum usurarum? Is this merely a tautology; viz, that the pursuer can claim his interesse and can claim beyond the levels of usurae prescribed by law? The emphatic quidem argues against such an interpretation. An alternative explanation is that Ulpian was among the first jurists to allow the pursuer to claim in this action for his positive loss (interesse) where previously only usurae could be claimed. If this were the case he might well have formulated his opinion to emphasise that the claim could encompass more than usurae. Support for this view can be drawn from the fact that D.12.3.3, D.13.4.2.8 and D.13.4.4 all come from Ulpian ad edictum.

The text then proceeds to a further example of the way in which the pursuer may have suffered loss, quid si merces solebat comparare. As is shown by the question which follows, an et lucri ratio habeatur, non solius damni, this example raises a different issue from the earlier ones where the creditor incurred a penalty or securities were lost. The text has progressed from consideration of positive loss to consideration of lost profit. But Ulpian does not make a general statement to the effect that in all

cases lost profit could be reclaimed in this action. The imperfect tense solebat shows that he was thinking of a case where the pursuer bought property on a regular basis. The nature of Ulpian's decision is simply that in this particular case he was inclined to the view (puto) that the pursuer's loss was not too remote to recover. The lost profit in this case is closely analogous to positive loss.

Besides the alleged contradiction between the views of Ulpian and Hermogenianus, the other main argument advanced against the authenticity of D.13.4.2.8 is its form. Kaser<sup>97</sup> has pointed out that in this respect, and also with regard to content, D.13.4.2.8 is so similar to D.12.3.3 that the parts of the texts which he sees as suspect must both have been written by the same hand. Medicus<sup>98</sup> argues that Ulpian could not have been their author even if we assume that he is innovating with respect to interesse in the actions discussed. He suggests that Ulpian's opinion in D.12.3.3, which is from the 30th book of his edictal commentary, would hardly have been formulated as it is; viz, as a statement denying iusiurandum in litem followed by the qualification nisi forte ... fin, if, in D.13.4.2.8 and D.13.4.4pr., which are taken from an earlier section (book 27) of his edictal commentary, Ulpian had already decided the question of interesse in the affirmative.

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97. Q.E.R.E. p.128.

98. Op.cit., p.22 n.16.

The observations on the form of D.13.4.2.8 do not amount to a serious objection. Firstly, we should note that although the text gives the appearance of having been abbreviated<sup>99</sup>, the discussion nevertheless progresses in a perfectly logical manner<sup>100</sup>. Quid enim si ... distracta est simply represents what, in the eyes of Ulpian, are examples of positive losses for which the pursuer could claim compensation. Also it is worth noting the use of the word puto in the context of lost profit. Such a usage (a

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99. Which according to Honsell explains the texts' grammatical irregularities.

100. A possible objection would run as follows: we have already noted that it was only as the result of judicial extension that the interest of the pursuer came to be taken into consideration in the actio de eo quod certo loco. Certainly even after this judicial extension, to begin with, the pursuer could only claim the 'objektive Wertdifferenz' where he sued at a different place than that set aside for payment; see Dumas, op.cit. p.624ff. For example, if Seius promised to deliver 100 measures of corn at Ephesus where they were worth 60 but the claim had to be made at Rome where they were worth only 50, the judge could take account of this difference. In D.13.4.2.8 the judicial extension of the action to cover the interest of the pursuer is recorded (Iulianus Labeonis opinionem sectus etiam actoris habuit rationem cuius interdum potuit interesse Ephesi recipere.); hence the period of time to which it is referring is precisely that when the extension was first made. It might, therefore, be argued that if any examples of the interest of the pursuer were then to be given, they should be of the 'objective' sort which were covered by the action at this time. As it is the text jumps from a statement that account would be taken of the interest of the pursuer (itaque utilitas quoque actoris veniet) to the examples of positive loss. It is likely that it was only after still further development that the sorts of positive loss mentioned in the section quid enim si ... fin came to be reckoned in the action. Why, therefore, should they appear in D.13.4.2.8 and not examples of 'objektive Wertdifferenz'?

verb in the first person singular) in the hands of the compilers is extremely unlikely, a fact which suggests that at least this part of the text is genuine. Yet if the part relating to lost profit is genuine it is all the more likely that the part relating to positive loss is also. A further factor to bear in mind is that Ulpian probably had before him works of earlier jurists when writing his edictal commentary<sup>101</sup>. It is quite possible that on occasion he used the opinions of these jurists as a basis to which he added his own comments. Were this so in the texts which we have been discussing we would have an explanation for the nisi and quid enim si clauses and we would also be able to meet Medicus's objection to D.12.3.3.

We conclude that D.13.4.2.8, which discusses the actio de eo quod certo loco, is the work of Ulpian<sup>102</sup>, probably working upon the opinions of other jurists. As regards the position in the actio depositi in factum this conclusion helps us in two ways. Firstly the actio de eo quod certo loco is a stricti iuris remedy possibly with a condemnatio q.e.r.e. If interesse of the sort mentioned by Ulpian could be recovered in this action it supports the argument that such losses could also be claimed in the

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101. See Schulz, Roman Legal Science (Oxford, 1946) p.196ff.

102. Also D.13.4.4pr. (Ulp. 27 ed.) Quod si Ephesi petetur, ipsa sola summa petetur nec amplius quid, nisi si quid esset stipulatus, vel si temporis utilitas intervenit.

action in factum where clear evidence to this effect, as in D.12.3.3, is also available. Secondly, if D.13.4.2.8 is genuine this speaks for the authenticity of D.12.3.3 because, as Kaser has remarked, both texts were clearly written by the same person, which is not surprising because they are both from Ulpian ad edictum. The similarity between the texts is in their form and in the nature of the losses which Ulpian uses to illustrate the pursuer's interesse. In D.13.4.2.8 he says: quid enim si traiecticiam pecuniam dederit Ephesi recepturus, ubi sub poena debebat pecuniam vel sub pignoribus, et distracta pignora sunt vel poena commissa mora tua? In D.12.3.3, quid enim, si sub poena pecuniam debuit? Aut sub pignore, quod, quia deposita ei pecunia adnegata est, distractum est?

The allegedly corrupt part of D.12.3.3 is introduced by nisi. Nisi is often used to qualify a preceding decision. For example, in this text it is used to qualify a statement which allows no room for a claim for interesse. As noted earlier, the communis opinio questions why D.12.3.3 should be formulated in this way and concludes that it is due to the compilers. But the form of D.12.3.3 can be explained, like that of D.13.4.2.8, by assuming that Ulpian was qualifying the opinion of another jurist<sup>103</sup>.

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103. Nisi is found extensively in the writings of Ulpian. There is no reason to assume that its use is always due to the compilers; see Michel, Gratuité en Droit Romain (Bruxelles, 1962) p.64.



Therefore, as regards the actio depositi in factum the evidence shows that Ulpian was prepared to allow the pursuer to recover his interesse. Interesse included, not just the value of the property but also the positive losses (for example, the incurring of a penalty or the loss of a pledge) which the pursuer had suffered as a result of the failure to return the deposit. We have suggested that the recovery of these positive losses was an innovation of Ulpian. However, at least as regards D.12.3.3 this does not have to be assumed<sup>104</sup>. We will now show that in a particular case damages in the action in factum were already related to the pursuer's loss long before the time of Ulpian. The discussion concerns the return of a deposit in a deteriorated state and in this case damages were less than the full value of the object deposited.

The wording of the formula in factum shows that when first introduced the action lay only where property had not been returned (eamque dolo malo redditam non esse). Later, however, juristic extension brought within the ambit of the action return of the deposit in a deteriorated state, where the deterioration was due to the depositee's dolus.

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104. We have a decision of a jurist denying iusiurandum in litem in the case of a deposit of money. Even if, in the time of this jurist, a claim for interesse (positive loss) was possible, he might nevertheless express his decision as a flat denial because he was concentrating on the fact that in such a case, certa sit nummorum aestimatio. Ulpian, who takes a wider view, simply adds by means of nisi ... fin that the loss of the pursuer might go beyond the simple value of the deposited money.



D.16.3.1.16 (Ulp. 30 ed.) Si res deposita deterior reddatur, quasi non reddita agi depositi potest: cum enim deterior redditur, potest dici dolo malo redditam non esse.

We can see from the text<sup>105</sup> that the return of damaged property was fictitiously treated as a non-return. This was necessary because the formula in factum itself only allowed a claim in the case of non-return of the property;<sup>106</sup> one therefore had to treat the damaged property as not returned if an action in factum was to lie in such circumstances. On this view, prima facie we might expect that in the condemnatio account was nevertheless taken of the fact that the deteriorated property had indeed been returned, and that damages were therefore referred only to the pursuer's loss. But Beseler<sup>107</sup> maintains that even in this case damages comprised the full value of the property on the grounds that the action contained a penal element.

Maschi takes a different view of the text<sup>108</sup>. He points out that in the actio depositi and actio commodati the formula in factum requires the return of eadem res. Return

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105. The text has been subject to some manipulation; see Beseler, ZSS 47 (1927) p.366 and Kaser, Q.E.R.E. p.70. However, there is no denying that it is basically sound. A similar development occurred in the actio commodati in factum; cf, D.13.6.3.1 (Ulp. 28 ed.).

106. See Kaser, Q.E.R.E. p.70.

107. ZSS 47 (1927) p.366; contra, Kaser, Q.E.R.E. p.71 n.9.

108. La Categoria dei Contratti Reali (Milan, 1973) p.164ff.

of the property in a deteriorated state was not eadem res and therefore property deterior facta was simply considered as not returned. For this reason, in Maschi's opinion, damages comprised the full value of the property originally deposited.

The common feature in both these approaches is that damages in the case of damaged property were thought to be penal in the sense that it might comprise more than the pursuer's loss. This is surprising because we know from D.16.3.1.1 that in the standard case where property was not returned damages contained no penal element: praetor ait: quod neque tumultus neque incendii neque ruinae neque naufragii causa depositum sit, in simplum ... Clearly in this instance the damages were the simple value of the property not returned. There is no good reason to think that the depositee who returned deteriorated property was treated more severely than he who failed to return. It seems likely, therefore, that where property was returned in a deteriorated state damages must have been referred to the pursuer's loss. If this is correct the further question to determine is at what point in time the jurists extended the action in factum to cover the return of a damaged deposit. D.16.3.1.16 comes from Ulpian, as does D.13.6.3.1, the text which refers to the similar development made in the actio commodati in factum. But it would be most surprising if this juristic extension of the respective actiones in factum was so late. That it was in fact much earlier is shown by D.16.3.34 (Labeo 2 pithanon).

D.16.3.34 (Labeo 2 pithanon) Potes agere depositi cum eo, qui tibi non aliter quam nummis a te acceptis depositum reddere voluerit, quamvis sine mora et incorruptum reddiderit.

There is some debate whether this text refers to the actio depositi in factum or to the action in ius. Rotondi<sup>109</sup> states that there are no 'motivi sicuri' for referring it to the action in ius. Kaser<sup>110</sup>, however, followed by Gandolfi<sup>111</sup>, decides that the action in ius must have been under discussion. He comes to this conclusion on the basis of an erroneous comparison of this text with D.12.5.9pr. and 1 (Paul 5 ad Plaut.)<sup>112</sup>. The latter texts deal with a procedural problem, viz, the nature of the remedy available where I had to pay you money to induce you to return property which you owed me on a contract which we had concluded earlier. 9pr. states that if I lent you clothes (commodatum) I can bring a condictio for the return of the

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109. Scritti 2, p.38. But cf., Scritti 2, p.83.

110. Q.E.R.E. p.72.

111. Il Deposito, p.89.

112. See also, Rotondi, Scritti 2, p.83.

D.12.5.9pr. (Paul 5 ad Plaut.) Si vestimenta utenda tibi commodavero, deinde pretium, ut reciperem, dedissem, condictione me recte acturum responsum est: quamvis enim propter rem datum sit et causa secuta sit, tamen turpiter datum est. 1. Si rem locatam tibi vel venditam a te vel mandatam ut redderes, pecuniam acceperis, habebis tecum ex locato vel vendito vel mandati actionem: quod si, ut id, quod ex testamento vel ex stipulatu debebas redderes mihi, pecuniam tibi dederim, condictio dumtaxat pecuniae datae eo nomine erit. Idque et Pomponius scribit.

money in question<sup>113</sup>. D.12.5.9.1 then states that reclaim of the money by a contractual action was only possible where the action contained a bona fide clause<sup>114</sup>. Paul continues - if the property was owed on an actio ex testamento or on an actio ex stipulatu the appropriate remedy for the return of the money was the condictio. Kaser's point is that like these last two actions the actiones depositi and commodati in factum were stricti iuris. As a result reclaim of money in similar circumstances where the respective action in factum was being discussed must have been by condictio<sup>115</sup>. Therefore, where, as in D.16.3.34, the actio depositi is given by Labeo for this purpose, Kaser concludes that this must have been the bona fide actio depositi in ius, not the action in factum.

While Kaser's argument is quite logical, his mistake is to assume that the facts discussed in D.12.5.9pr. and 1 and D.16.3.34 were the same. The former texts deal with a

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113. For deposit, D.12.5.2.1 which discusses the availability of the condictio to reclaim money paid for the return of a deposit.

D.12.5.2.1 (Ulp. 26 ed.) Item si tibi dederō, ut rem mihi reddas depositam apud te ...

114. This can be deduced from the examples of the actions given (ex locato vel vendito vel mandati) and the comparison of the position in these remedies with that in the stricti iuris actiones ex testamento and ex stipulatu.

115. As is shown by D.12.5.9pr. where Paul was discussing the actio commodati in factum.

claim for the return of money which I had to pay over to get my property back. D.16.3.34 on the other hand deals with a case where the depositee is refusing to return the property until he receives payment. It is clear from the word voluerit that the depositee has not returned the object in question and that he is demanding payment which he has not yet received. The claim in this case is not therefore for money paid which was not owed<sup>116</sup> but in fact for the deposit itself!! In addition, what confirms that Labeo was discussing the actio depositi in factum is the clause, quamvis sine mora et incorruptum reddiderit. The action in factum dealt with the non-return of a deposit and - once extended by the jurists - with its return in a deteriorated state. It is precisely to these two conditions that Labeo refers here. He is saying that an actio depositi (in factum) lies for the return of a deposit even where, were the depositor to pay the depositee, the depositee would satisfy the conditions of the action in factum by returning the property sine mora and incorruptum.

The fact that in D.16.3.34 reference was to the action in factum<sup>117</sup> shows that certainly by the time of Labeo

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116. In fact the title of D.12.5 is De condictione ob turpem vel iniustam causam.

117. Burillo, SDHI 28 (1962) p.280 also believes that the text deals with the action in factum. His reasoning, however, is incorrect.

a claim was allowed where property was returned in a deteriorated state. Because in such claims damages were referred to the pursuer's loss, this in turn means that by Labeo's time damages in the action in factum, at least in the damaged property cases, were referred to the pursuer's interesse (loss) and did not comprise the full value of the deposit.

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